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National Technical Information Service**

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**Transcript CONTU Meeting No. 11 Held at
Arlington, Virginia on January 13-14, 1977**

National Comm on New Tech Uses of Copyrighted Works, Wash, D C

Jan 77

NATIONAL COMMISSION ON
NEW TECHNOLOGICAL USES
OF
COPYRIGHTED WORKS

ELEVENTH MEETING

TRANSCRIPT OF PROCEEDINGS

Place: Arlington, Virginia

Date: January 13, 1977

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17. Key Words and Document Analysis. 17a. Descriptors																						
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NATIONAL COMMISSION
on
NEW TECHNOLOGICAL USES
of
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- - - - -

Eleventh Meeting

Room 910
Crystal Mall Building No. 2
Arlington, Virginia

THURSDAY, January 13, 1977

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New York Court of Appeals

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- C O N T E N T S -

STATEMENT BY:

P a g e

ARTHUR J. LEVINE
Executive Director

4

DR. RICHARD FARLEY, DIRECTOR
and

WALLACE OLSEN, DEPUTY DIRECTOR
FOR LIBRARY SERVICES
National Agricultural Library

6

GERALD J. SOPHAR
FORMER EXECUTIVE DIRECTOR
COMMITTEE TO INVESTIGATE COPYRIGHT PROBLEMS

23

DR. EDWARD C. MC IRVINE
MANAGER, TECHNICAL ASSESSMENT, XEROX CORPORATION

63

BEN H. WEIL,
EXXON RESEARCH AND ENGINEERING COMPANY

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1 JUDGE FULD: I call to order the eleventh
2 Public Hearing of the National Commission on New
3 Technological Uses of Copyrighted Works.

4 Before we start on our formal agenda, I would
5 like Mr. Levine to say a few words about a number of
6 subjects.

7 MR. LEVINE: On May 27, 1976, in response
8 to Judge Fuld's letter to Senator McClellan, offering
9 the services of CONTU in bringing the Library and
10 Author/Publisher groups together to draft guidelines on the
11 Proviso to Section 108(g)(2), Senator McClellan replied
12 to Mr. Fuld's letter and said:

13 "Senate Report 94-473 in its analysis of
14 Section 108 states in part:

15 Concerning Library photocopying practices
16 not authorized by this legislation, the
17 Committee recommends that workable clearance
18 and licensing procedures be developed.'

19 I believe it is important that there be no
20 disruption in the use of copyrighted materials
21 by the patrons of libraries following the
22 coming into effect of S-22 because of the
23 absence of appropriate clearance and licensing
24 procedures for the types of photocopying
25 practices not included within the Exemptions

1 "of S-22. I therefore request, in
2 accordance with the recommendations of
3 the Senate Committee on the Judiciary
4 that the Commission -- in conjunction with
5 the formulation of guidelines -- take appro-
6 priate initiatives in coordinating the
7 establishment of necessary clearance and
8 licensing mechanisms."

9 The Judge, in his response to the Chairman,
10 indicated that we would, in fact, make this a priority
11 item of the Commission, and our hearings for the next two
12 days will be devoted in part to difficulties that user
13 groups may be facing in the absence of a clearance and
14 licensing system, and the difficulties that authors and
15 publishers face in providing for workable clearance
16 and licensing systems.

17 There are several efforts under way now, and
18 we will be hearing of some of those efforts in the next
19 two days. But it is, I believe, the sense of the
20 Commission that these efforts among the private parties
21 be gone ahead with in earnest so that on January 1, 1978,
22 when the new provisions on Library Photocopying and
23 Fair Use come into effect, there will be, also in
24 effect, a Clearance and Licensing System that will
25 provide for access to copyrighted materials.

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1 JUDGE FULD: I am sorry that some of the
2 Commissioners have been delayed because of inclement
3 weather in other parts of the Country. They are late in
4 arriving here. They ought to be here shortly.

5 We will begin our session, though, and they will
6 have the benefit of the transcript.

7 We are delighted to have with us as our first
8 speakers today, Richard A. Farley and Wallace Olsen
9 who are, respectively, the Director and the Deputy Director
10 of Library Services of the National Agricultural Library.

11 Dr. Farley has been its Director since July of
12 1974. Prior to assuming that post, he was a Director
13 of the two-million volume , McGill University Library
14 System.

15 He has also served in several Library posts
16 in colleges and universities in this Country.

17 Mr. Olsen -- who became Deputy Director
18 in the summer of 1976 -- had been Library Liaison Officer
19 to the Land Grant University Libraries at NAL since
20 1970.

21 Before joining that organization, he was a Research
22 Associate and Project Director of EDUCOM for three years; and
23 author of several articles and publications.

24 Mr. Olsen is also a member of many professional
25 Library Associations.

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1 Both speakers will describe the National
2 Agricultural Library network for supplying photocopies;
3 will outline their plans for operation under the new law when
4 it takes effect on January 1, 1978.

5 Dr. Farley and Mr. Olsen:

6 PROVISION OF PHOTOCOPIES BY THE
7 NATIONAL AGRICULTURAL LIBRARY
8 AND ITS AFFILIATED LIBRARIES
- by -

9 DR. RICHARD FARLEY, DIRECTOR
-and -
10 WALLACE OLSEN, DEPUTY DIRECTOR
FOR LIBRARY SERVICES, NAL

11 JUDGE FULD: You will speak first, Dr. Farley.

12 DR. FARLEY: Thank you.

13 Our report this morning is divided into three
14 parts; the first two, I will handle, and the third one
15 Mr. Olsen will handle.

16 Do you gentlemen have copies of this report
17 before you?

18 I think it will be easier for you to follow
19 if you do.

20 JUDGE FULD: Go right ahead, sir.

21 DR. FARLEY: First of all, we would like
22 to talk to you about the dimensions of the photocopy
23 task at the National Agricultural Library -- the
24 record of current activity, which you will find in
25 Exhibit A. We thought the best way to do this was

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1 to take a page out of our Objectives notebook, and
2 tell you what is going on at the present time at the
3 National Agricultural Library.

4 You will see, in Exhibit A, month by month, what
5 our output is in Photocopying.

6 If you will turn to page 2, I have some
7 comments to make about this record.

8 At NAL, we make only one copy of each
9 article requested. This averages to about ten pages
10 per request. The major portion of these copies goes to
11 USDA scientists and researchers. We provide the same
12 service to the public through our paid photocopying
13 section. The charge is for the cost of copy, only.

14 It has not been determined that what we are
15 doing is either systematic or fair use. For planning
16 purposes, we have assumed that it is systematic copying.

17 We estimate that 90% of the loans we provide are
18 through photocopies. In a typical month, we estimate
19 that we copy up to 10,000 copyrighted articles; or about
20 50% of our total lending business.

21 About 15% of these copies are provided through
22 cooperating land-grant university libraries. NAL pays
23 a fee for each copy provided to a USDA employee.

24 An observation: The introduction of Current
25 Awareness Service in the USDA has brought on a dramatic

1 increase in requests for photocopies. This has been in
2 operation just a little over a year.

3 You will notice that, in November, we reached
4 27,000 loans -- a very dramatic increase; such an increase
5 that it is taxing our resources.

6 If you will turn to Exhibit B, you will see the
7 alternatives, and combinations of alternatives, that we
8 have considered in meeting the Copyright law.

9 First of all, to circulate, rather than copy
10 issues of the last five years of copyrighted journals --
11 that is, duplicate Periodical Reading Room subscriptions
12 and establish a "circulating collection" using our Reading
13 Room journals as a back-up to fill requests for copying
14 articles when ^{the} "circulating" copy is charged. This type
15 of copying might not be considered systematic.

16 This may be particularly helpful in field
17 locations, if land-grants in the regional document
18 delivery network can no longer supply photocopies to
19 USDA requesters.

20 Second: Utilize existing reprint, or tear
21 sheet, services, especially OATS, so that USDA agencies
22 can subscribe to ISI Current Contents and use OATS
23 services, with charges to be paid by NAL.

24 This may be particularly helpful in field
25 locations.

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1 Third: Combining 1 and 2 above, using
2 "circulating" copies for local requests, and OATS service
3 for field locations.

4 Fourth: Develop our own tear sheet service
5 so that, instead of circulating duplicate journal issues
6 as suggested in 1 above, we tear requested articles out of
7 the duplicate copies, still using PRR journals and regular
8 collection as a back-up for copying when articles have
9 been torn out previously.

10 Fifth: A combination of 2 and 4 above.

11 Sixth: Investigate the purchasing or leasing
12 of journals on microfilm -- in addition to subscribing to
13 hard copy -- with accompanying copying rights. Our
14 current agreement with the American Chemical Society is
15 one example of what might be worked out.

16 Seventh: Work out a combination of 2, 4 and 6
17 above, since not all journals will be available on micro-
18 film.

19 Eighth: Make arrangements with the "most used"
20 publishers -- titles most often requested -- plus
21 publishers who publish two or more "in scope" titles, to pay
22 a flat fee for copying rights. FLC might work out
23 contracts with all Federal libraries.

24 JUDGE FULD: I understand that, under the
25 present arrangements, nothing is made - - no payments are

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1 made to the copyright owner?

2 DR. FARLEY: That is right! That is right.

3 Nine: Make an extra copy of the title page
4 for each article copied; sort daily by title/publisher,
5 and submit weekly or monthly to individual publishers
6 -- or clearing house, if established -- for regular
7 billing. NOTE; This could be done in Arrangement 8
8 above.

9 Ten: Use the NCLIS survey data for another
10 in-depth study. In the meantime, keep alternatives in
11 mind and, perhaps, make some effort to determine cost
12 and staff requirements for each; but take no action until
13 copyright revision goes into effect and the guidelines are
14 established.

15 NOTE: Given a choice of these alternatives,
16 NAL would opt for payment through a clearinghouse (9). The
17 added clerical load is the most fearful aspect of this
18 program-- from our point of view.

19 Do you have questions for me before we go to
20 Mr. Olsen?

21 MR. FRASE: I am not quite sure I understand
22 this No. 1.

23 Would this involve subscribing to additional
24 subscriptions to the journals that you already have?

25 DR. FARLEY: Yes. Thirty years ago, we

1 circulated bound volumes and copies. We did not copy.
2 We sent them through the mail. It would be a return to
3 this practice.

4 MR. FRASE: Also, do these alternatives and
5 combinations apply not only to your central operation
6 but, also, the field operations?

7 DR. FARLEY: Yes. The Land-Grant University
8 Libraries are very interested in what we are going to do.
9 Some of them have already stopped supplying photocopies.

10 MR. WEDGEWORTH: Mr. Chairman?

11 JUDGE FULD: Mr. Wedgeworth.

12 MR. WEDGEWORTH: Dr. Farley, I would like for you
13 to expand a bit on your note under "Ten", about the
14 fearful aspect -- the clerical load being the most
15 fearful aspect of the use of the clearing house.

16 I would like to have a better understanding of
17 what, exactly, you are referring to in that note.

18 DR. FARLEY: You may know that, in the Federal
19 sector, we work under a rigid personnel ceiling. The
20 addition of a clerical/^{unit}would have to be absorbed by some
21 other unit.

22 MR. WEDGEWORTH: This is a load that would not
23 be present in the other alternatives that you are
24 considering?

25 DR. FARLEY: If we could submit easily -- without

1 keeping a lot of records -- through a clearinghouse, we
2 would like that best.

3 MR. WEDGEWORTH: I was particularly interested
4 in that with respect to your Alternative No. 9, where
5 you would be collecting this information, and suggest
6 that you might submit for a monthly billing.

7 DR. FARLEY: We simply make a photocopy when we make
8 the copy of the title page; submit it to the publisher;
9 and let them bill us.

10 MR. WEDGEWORTH: But I gather that you suspect
11 that the clerical load for a clearinghouse might exceed
12 that, for simply making that kind of a monthly request
13 for billing?

14 DR. FARLEY: Yes.

15 The clerical load is another dimension, too.

16 One would have to identify copyrighted articles, --

17 MR. WEDGEWORTH: Yes.

18 DR. FARLEY: -- among the mass of materials that
19 we copy.

20 JUDGE FULD: Is that difficult -- identifying
21 them?

22 DR. FARLEY: Yes. The piece has to be examined.
23 We have thought, for example, that, in our data base,
24 eventually we will signal the copyrighted citations, so that
25 the person who uses the service will know that he is asking

1 for a copyrighted article.

2 MR. NIMMER: Are you suggesting that, if you
3 follow No. 9 -- submitting the title page -- that that
4 would avoid the clerical load; or that that would create
5 the clerical load?

6 DR. FARLEY: It would avoid it.

7 MR. WEDGEWORTH: In other words, it would be up
8 to the Copyright proprietor to make that determination?

9 DR. FARLEY: Yes.

10 MR. NIMMER: So you prefer No. 9 because that would
11 avoid the clerical workload?

12 DR. FARLEY: Yes.

13 JUDGE FULD: Any other questions?

14 MR. WEDGEWORTH: Not at the moment.

15 MR. FRASE: What are the prices on page 2?

16 One is what you charge the public, in the first
17 paragraph. "Charges for the cost of the copy, only".

18 DR. FARLEY: For a Xerographic copy. \$1.00 for
19 each ten pages, or fraction, copied from a single article
20 or book.

21 For microfilm, \$1.00 for each thirty pages, or
22 fraction, copied from a single article or book.

23 MR. NIMMER: This includes postage, if you supply
24 it?

25 DR. FARLEY: Yes.

1 MR. FRASE: What about, in the fourth paragraph
2 on that page, "NAL pays a fee for each copy provided."

3 DR. FARLEY: Mr. Olsen will explain that in his
4 discussion. He will tell you how much that costs.

5 JUDGE FULD: Mr. Wedgeworth?

6 MR. WEDGEWORTH: Yes. I have just one more
7 question for Dr. Farley.

8 Again, in No. 10 you say that you may wish to
9 use the NCLIS survey data for another in-depth study.

10 Do you anticipate that you will not get the data
11 that you would like to get from that study?

12 If so, could you give us some indication of the
13 areas that you would like to reinforce?

14 DR. FARLEY: Not necessarily.

15 We hope that the study will give us what we need.
16 We might pursue it one more step, if it does not.

17 MR. WEDGEWORTH: I see.

18 Could you give us any indication of the specific
19 areas in which you expect the data to give you the most
20 assistance in developing your plans?

21 What specific pieces of information do you anticipate
22 will be helpful?

23 DR. FARLEY: I don't think I know enough about it to
24 comment on it, here. I would have to review the input study.

25 MR. WEDGEWORTH: Thank you.

1 JUDGE FULD: Mr. Olsen?

2 MR. OLSEN: Thank you.

3 If I may, I would prefer to read -- although
4 you have Exhibit C in front of you -- for the sake of the
5 others, I will read the statement.

6 The Department of Agriculture has almost 80,000
7 employees, of whom 85% are at locations outside the Washing-
8 ton, D.C. area. Near 10% of all employees are scientists,
9 technologists, managers or administrators, and form the
10 central core of personnel who need active access to the
11 published literature. Problems in getting literature where
12 needed are much like those of the public library getting
13 into remote areas. People in central city or urban locations
14 can do fairly well for themselves; but the person in
15 Cut Bank, Montana, working on a soil mechanics problem on a
16 reach of the Missouri River, or the forestry scientist in
17 Ogden, Utah, working in insect pathology, has a far more
18 difficult literature problem. The standard approaches of
19 building small collections, and eventually libraries inade-
20 quately staffed; subscribing to journals and routing them
21 for multiple use; or traveling to an academic library at some
22 distance, have not proven adequate.

23 For many years, the U.S. Department of
24 Agriculture has offered sophisticated assistance in solving
25 these job-related, literature requirements. That of photo-

1 copies supplied, in lieu of loaning is our topic today.

2 In the 1940's, through the aggressive and pioneer-
3 ing work of Dr. Ralph Shaw, Director of the Department's
4 Library, photocopy equipment was designed and introduced
5 for this purpose prior to the wide use of the machines of
6 today. Dr. Shaw also introduced a precursor program to that
7 which we now employ: utilizing local sources of supply,
8 direct loan of journals and monographs, and photocopies of
9 materials. This limited geographic service ceased in the
10 late 1950's.

11 Photocopies, in lieu of loan, constitute near
12 90% of all document delivery transactions, which are projected
13 to reach 228,000 this fiscal year, 1977. This is a 7-1/2%
14 annual growth; the previous year's growth was 19%, and is
15 more typical of the 10-15% transaction annual growth since
16 1970 when computerized tape services began to show a marked
17 influence through current awareness programs. Nearly 100%
18 of this increase has been in photocopies supplied; rather
19 than the loan of hard copy volumes. The heavier growth
20 in the past two years has been to those units outside the
21 Washington, D.C. area.

22 The present Regional Document Delivery System
23 administered by the National Agricultural Library, was
24 created in 1973 on a pilot basis, in three southern States.

25 The impetus for its creation came from two needs:

1 1. To find a speedier way to meet the expanding
2 literature needs of U.S.D.A. personnel; and

3 2. To find alternative sources of supply

4 Both had to be compatible with the funds
5 available and the human resources to manage the programs.
6 The system is based on the same principles as the limited
7 program, fifteen years before.

8 Each State has a land-grant university responsible
9 for agricultural education and the publicly-supported
10 agricultural research in the States. These universities
11 are active cooperators with the USDA in agricultural
12 extension programs, research, forestry and conservation
13 programs. The interaction of USDA and land-grant personnel,
14 programs and funding, is extensive -- largely as a result
15 of Federal authorizations and encouragement.

16 These activities are mostly cooperative and
17 jointly funded. It is on this base of 100 years of
18 cooperative effort that NAL has laid its structure for
19 regional literature service to USDA facilities and
20 personnel.

21 At present, 24 States grouped into five regions
22 are covered by signed agreements between the land-grant
23 university libraries and the NAL. States included have
24 been determined on the basis of the numbers of literature
25 users in the State, and geographic distance from NAL.

The methods are simple:

USDA personnel in a State are sent an announcement letter with details about submitting requests for literature to their State land-grant university library, where they are served at our expense. Henceforth, they are asked not to send their requests to Beltsville, Maryland--except in unusual circumstances.

A strong resource library in each region serves as the second stop, or the referral point, when the first land-grant cannot fill the request.

For example, a request, coming to Oklahoma State University Library, which cannot be completed, is relayed by mail or TWX to the regional resource library--Texas A&M University Library. By this two-step approach, 77% of all field requests are completed without coming near NAL. The fulfillment rate has increased to the 77% level--from 71% in 1974, and 72.4% in 1975.

The land-grant universities are presently averaging a total of 4,100 requests a month from USDA personnel in the 24 States. Supplemental documents submitted here describe the structure, payment schemes, and numerical growth by region, in some detail. We have built this effort as a cooperative endeavor, utilizing the past interaction of the land-grant universities and the USDA.

The land-grant librarians feel they are pro-

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1 viding a worthy service to taxpayers in their States and,
2 therefore, are not adamant about receiving full payment for
3 the service provided. Their willingness to cooperate,
4 and the speed with which they provide the service, are a
5 demonstration of a valuable service from public institu-
6 tions working together.

7 The heaviest users of our document delivery
8 services are personnel of the Agricultural Research
9 Service, whose scientists are very similar to their
10 counterparts in the academic community. In fact, many of
11 these scientists have joint appointments with, and are
12 physically located at, land-grant or other university
13 campuses.

14 Four years ago, the Agricultural Research
15 Service began a citation current-awareness service --
16 known as SDI to some -- in an effort to assist personnel
17 in overcoming the flood of literature to be seen and
18 required by their research efforts, and as professionals.
19 This program has grown into a service utilizing ten major
20 citation data tapes, with mailings around the United
21 States on a monthly or more frequent sequence, to more
22 than sixteen hundred scientists and administrators.
23 The number of citations distributed in 1976 is estimated at
24 two million. These are stripped from tapes against an
25 individual user's profile. All costs are paid by the

1 administrative offices of the Agricultural Research
2 Service.

3 Two years ago, the National Agricultural Library
4 agreed to accept the citation-alerting form used by the
5 current awareness service as a legitimate document request
6 form. This dramatically saved clerical time at the users'
7 offices, since the requests did not have to be transferred
8 to our standard form.

9 At present, approximately 55% of all literature
10 requests coming from USDA personnel are on these
11 current awareness forms. We have not been able to ascertain
12 with a great degree of certainty how much the current
13 awareness service has increased the document requests
14 being submitted.

15 We are presently evaluating the Regional
16 Document Delivery System, and it appears that, in the opinion
17 of the user, the current awareness service has sharply
18 increased literature requests from about a quarter of our
19 users; about 50% feel that they would be requesting the
20 material regardless; the remainder are not utilizing
21 the current awareness service of the Agricultural Research
22 Service, but may have access to other alternative
23 operations.

24 Regardless of the statements made by the
25 users in this regard, the NAL staff -- which must handle

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1 the six to seven hundred requests coming in by mail each day
2 -- have a strong counter opinion. We know the increases
3 in requests have been greatly aided by the easier dissemina-
4 tion of citations, whether by citation alerting services,
5 or extensive retrospective searches. In both cases, the
6 advent of the technological economies of magnetic tape systems,
7 computerized storage and retrieval, online access and
8 telecommunications, have revolutionized literature aware-
9 ness and use. These systems have placed a resulting
10 pressure on seeing literature which might have otherwise
11 been overlooked. These pressures, in turn, have caused
12 our people to turn to literature repositories for photo-
13 copies as a realistic way to stay professionally alive.
14 Economic downturns, such as most Federal units have
15 experienced in the past five years, cause scientists and
16 librarians to search for alternative methods to stretch
17 a dollar and still provide viable services.

18 The evident growth and speed-up of citation and
19 document delivery is welcomed by most librarians and others
20 working with technical information. The solution to a
21 fair and equitable funding formula must be found.

22 I will answer questions if you have them.

23 JUDGE FULD: Mr. Lacy?

24 MR. LACY: Do you have any statistics which
25 are easily available showing the number of services

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1 rendered -- that is, by copies made -- by journals from
2 which the copy is made?

3 MR. OLSEN: We have some studies. We have
4 done some studies. I do not have those figures with me.
5 They have been submitted, also, as part of the NCLIS
6 study, I believe.

7 MR. LACY: Is there a high degree of concentration?

8 You spoke of the most used journals, a bit earlier.
9 If you took the 20 or 30 most used journals, do you have
10 any sort of a rough guess what proportion of your inquiries
11 would be served from them?

12 Would it be 5%, 10%, 50%?

13 I realize you don't have the exact figures.

14 MR. OLSEN: Because the Department is spread
15 very widely throughout the Country and, I suspect, because
16 the amounts of money invested for literature use are still
17 rather extensive, I don't think we quite follow the
18 patterns of many other studies in this regard. That
19 is, we don't have as high a concentration as with a few
20 journals.

21 There are a lot of journal subscriptions at
22 labs around the United States. People who are adjacent to,
23 or near, academic campuses often do walk over and look at
24 copies in libraries.

25 However, I would guess the figures of many

1 years ago would still pretty well hold; and that at
2 least 10% come from a very small cadre of journals.

3 MR. LACY: Would it be possible to provide the
4 Commission with whatever readily available figures you have
5 on that?

6 MR. OLSEN: Yes, we can do that.

7 JUDGE FULD: Any other questions?

8 MR. FRASE: Do I understand, from the map,
9 that the 24 States are in these five regions? The rest
10 of the States depend on the central library production?

11 MR. OLSEN: That is correct.

12 MR. FRASE: Do you plan to extend this regional
13 system; or will you continue it at its present status?

14 MR. OLSEN: I guess I should amend the previous
15 statement a slight bit.

16 We do have sixteen major field libraries, and
17 some of them hold responsibility for serving people
18 in regions. Others do not hold responsibility for
19 serving people in a region. Therefore, the demographic
20 count -- which I mentioned earlier -- has quite a bit
21 of influence on where we build, and where the libraries
22 are.

23 We have no plans, at present, for extension.
24 I think, geographically distributed regions or States
25 rather far distant from the National Agricultural
Library could be served usefully. And those would be in

1 West, primarily.

2 One of the interesting features is in the Mid-
3 west, -- which has heavy agricultural States --
4 where we have very strong land-grant university libraries.
5 We also have very strong State-supported agriculture.
6 Consequently, the Department of Agriculture seems not to
7 have as many researchers in those States, or research
8 organizations, or to be working with them.

9 So we have not felt the need to expand into
10 Iowa, Illinois, Ohio, and so forth.

11 MR. LEVINE: In Exhibit C, the estimate of
12 the cost per request completed is approximately \$3.00 --
13 a little in excess of that.

14 Is the dollar figure that Dr. Farley mentioned
15 the actual charge that you make per document request,
16 or is it the \$3.00 figure?

17 If there is a difference, is it merely a
18 subsidy?

19 MR. OLSEN: The costs you see in that table
20 are figured two different ways. The amount of money spent
21 is exactly the same. So, if you look at the number of
22 requests completed, it is \$3.32, because there is a 77%
23 completion.

24 If you look at all of the requests received,
25 it is \$2.55. . We prefer to use the latter, the

1 \$2.55 , because they are handling these, and we
2 do pay them a handling fee.

3 MR. CARY: In other words, that includes the 22%
4 that are not filled?

5 MR. OLSEN: That is correct --

6
7 MR. CARY: If I could ask just one question:
8 I think Mr. Frase touched on this, earlier, with Dr. Farley.
9 That was the statement on page 2 which says that the NAL
10 pays a fee for each copy provided for a USDA employee.

11 What is that fee that you pay?

12 DR. FARLEY: The fee we pay to the land-grant
13 university.

14 MR. CARY: Is it always the same?

15 DR. FARLEY: It will vary.

16 You see, again on Exhibit C, the costs in
17 the different regions. They will vary.

18 MR. CARY: In other words, you pay whatever
19 their normal fee is?

20 DR. FARLEY: Yes. We contract. We bargain
21 with them.

22 JUDGE FULD: Professor Miller?

23 PROFESSOR MILLEK: Which cost is this, in
24 Exhibit C? Is it the cost to the customer?

25 MR. OLSEN: The cost to the National Agricultural

1 Library, directly.

2 PROFESSOR MILLER: And, by cost -- what is
3 included in this cost?

4 MR. OLSEN: All costs we pay the land-grant
5 to supply this service. It does not include any overhead
6 at the National Agricultural Library at this time.

7 PROFESSOR MILLER: And the person who receives
8 the benefit of this service --

9 MR. OLSEN: Are the USDA employees in these 24
10 States.

11 PROFESSOR MILLER: Yes. I take it you do not
12 disagree in principle with the notion that the service
13 would not be materially affected by the imposition of a
14 copyright royalty?

15 DR. FARLEY: We would hope it would not. We have
16 tried desperately for it not to be. We tried not to
17 interrupt our service in any way.

18 PROFESSOR MILLER: By "interrupt our service",
19 what do you mean?

20 DR. FARLEY: Discourage people from asking
21 for copies.

22 PROFESSOR MILLER: But if we could devise a
23 method of reducing the transaction cost so that it
24 reduced itself to some near mathematical formula --
25 a per-page formula -- the incremental cost or copyright
royalty would not deter the utilization of the service

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1 itself, would it?

2 DR. FARLEY: No. As you look at these figures,
3 it would be fairly simple to add a copyright charge
4 to that charge that we are now paying.

5 PROFESSOR MILLER: So you are primarily concerned
6 with the administrative headaches of trying to administer
7 the scheme--rather than the dollar cost?

8 DR. FARLEY: Yes. And getting the dollars,
9 we might add!

10
11 DR. FARLEY: Because, in our case, we will
12 have to go to our administrators and say, "We need \$10,
13 \$20, \$30 thousand extra to pay copyright fees for material
14 we are supplying to our scientists."

15 PROFESSOR MILLER: Would that be easier
16 than asking for \$10, \$20, \$30 thousand for
17 additional clerical support?

18 DR. FARLEY: Off the top of my head, I would
19 say, "Yes". "Yes!"

20 JUDGE FULD: Mr. Wedgeworth?

21 MR. WEDGEWORTH: Just to clarify one point,
22 Dr. Farley. I think there are two elements to this
23 that have not been made as distinct as I would like to see
24 the record show.

25 One is the anticipated additional processing

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1 requirement, by the National Agricultural Library System,
2 for some kind of clearinghouse or licensing procedure.

3 The other would be the additional charge that
4 might be occasioned by the adding on of a royalty; and I
5 think that, implicit in your document when you say that
6 the clerical load is the most fearful aspect of it, you
7 are saying that this, the part that you cannot estimate,
8 could exceed any nominal additional charge simply
9 for royalty.

10 Is that a correct interpretation of what you
11 are saying?

12 DR. FARLEY: Yes.

13 JUDGE FULD: Any other questions?

14 MR. FRASE: Dr. Farley, in your list of
15 alternatives, there was some suggestion, in No. 8, that
16 the FLC -- which I assume is the Federal Library Committee

17 DR. FARLEY: That is correct.

18 MR. FRASE: -- might work out contracts for
19 all Federal Agencies.

20 Have discussions started in the Federal Library
21 Committee to have some such arrangement?

22 DR. FARLEY: I don't know. The reason we
23 suggested that is that the FLC has very effectively
24 arranged our connection with OCLC -- the Ohio College
25 Library Center. They are doing this very well, and

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1 it would follow that a similar program would be acceptable
2 by them.

3 JUDGE FULD: Thank you very much, gentlemen, for
4 your presentation.

5 Our next speaker is Gerald J. Sophar, also
6 with the National Agricultural Library. He has been
7 Executive Officer of NAL since 1971. He does not, however,
8 speak to us today as a representative of that organiza-
9 tion.

10 From 1966 to 1968, he served as the Executive
11 Director and Secretary of the Committee to Investigate
12 Copyright Problems.

13 Mr. Sophar has authored and co-authored many
14 professional publications dealing with aspects of
15 information retrieval, reprography, and copyright law.

16 Based on his earlier studies, he will share
17 with us his thoughts on the licensing/clearinghouse
18 system.

19 It is a pleasure to welcome him to our meeting.

20
21 STATEMENT BY
GERALD J. SOPHAR
22 FORMER EXECUTIVE DIRECTOR
COMMITTEE TO INVESTIGATE COPYRIGHT PROBLEMS
23 AFFECTING COMMUNICATION IN
SCIENCE AND EDUCATION, INC.

24 MR. SOPHAR: Mr. Chairman and Members of the
25 Committee: It is a pleasure to be here!

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1 I believe that I have been asked to testify to
2 the Commission because of my interest and active concern
3 with the new technological uses of copyrighted works,
4 between 1958 and March 1968 when the Williams and Wilkins
5 Company filed suit against the United States Government in
6 the United States Court of Claims. Since then, my interest
7 has remained high, but I have been forced to refrain from
8 active participation in the discussions, deliberations, and
9 debates about the proper use of copyrighted works in
10 document delivery and computer stored systems.

11 Before I go on, I want to explain that I am
12 testifying as an individual, and as a former Secretary
13 and Executive Director of the Committee to Investigate
14 Copyright Problems--not as the Executive Officer of the
15 National Agricultural Library. This kind of disclaimer
16 is common, and frequently tends to mute the value of the
17 testimony. Please be assured that Dr. Richard Farley,
18 Director of the National Agricultural Library, has in no
19 way attempted to restrict or control these remarks.

20 Although several of the Commissioners, the Register
21 of Copyrights, Barbara Ringer, and some of the staff of the
22 Commission know the story of the rise and fall of CICP;
23 others do not. Therefore, I think that I must tell some
24 of its history--if only to emphasize my observations,
25 conclusions, and recommendations.

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1 My interest in copyright law is an acquired taste.
2 I was marketing the unitized microform for the Microcard
3 Corporation when it was suggested to me, by the editor of
4 the not-for-profit Journal of the American Diabetes
5 Association, that related articles from other medical
6 journals could be inexpensively repackaged in microform.
7 Frankly, I thought that no more was involved than the
8 selection of appropriate articles by the society's editors;
9 organization of the material; and good microphotography.
10 My enthusiasm was larger than my knowledge!

11 I was soon told that we could not reproduce
12 selected articles without the permission of the copyright
13 holders. We were reasonably certain that we could obtain
14 the necessary permissions from a great many of the journal
15 publishers, because their goal was to disseminate information
16 -- the same goal as that of the American Diabetes Associa-
17 tion.

18 However, we soon realized that the effort and
19 cost of obtaining the necessary permissions, and the chance
20 that the packages would be less than complete, reduced
21 the potential benefits of the concept, considerably. It
22 was then that I discovered Article I, Section 8 of the
23 Constitution, and thought that I had the answer to our
24 problems.

25 I was a political science student, but I did not

know that one!

26

1 I contacted the Copyright Office and explained
2 my problem. They confirmed what I had been told by
3 others, namely: that we could not copy without the
4 permission of the copyright owner even to "promote the
5 Progress of Science and Useful Arts"--except for fair
6 use.

7 I would like to interject at this point that
8 while I was told that copyright was, indeed, an impediment
9 to the innovative use of microphotography as a means
10 for the dissemination of scientific information, these
11 people were just as anxious as I was, to look for solu-
12 tions. I shall always be thankful to Abe Goldman, George
13 Cary, Barbara Ringer and, of course, Abe Kaminstein, for
14 their interest and understanding. Above all, I appreciate the
15 time they gave, to the scientific and technical information
16 community, explaining copyright law. I could always count on
17 one of them to attend a CICP meeting; or participate on a
18 panel with information scientists and librarians.

19 My interests in 1958 were not confined to micro-
20 photography. As an active member of the American Society
21 for Information Science, I was very much aware of other
22 technological developments. Photocopying was becoming
23 simpler; and Xerography was crude but already very much
24 in use. The Xerox 914 -- the machine which probably has
25 had a greater impact on the efficiency with which librarians

service their patrons than any other tool, was only two years away. Indexes and documents were being stored on punched cards, on coded rolls of film, and on chits. Various small cadres were experimenting with computer-created and stored indexes. Some were talking and writing about the possibility of full-text storage.

It took no particular power to forecast and to recognize that the principles of copyright law were headed into a collision course, with new ways of gathering, storing, manipulating, identifying and disseminating information. Even now, I find it hard to understand why we could not see the obvious--when all of the signs clearly indicated the problems the Commission is asked to solve today.

On May 19, 1959, a group of concerned citizens -- if I may use that term -- met at the Windsor Park Hotel. The Moderator and Temporary Chairman for "The Conference to Investigate Copyright Problems Affecting Communication of Educational and Scientific Information" was Dr. Howard A. Meyerhoff, Executive Director of the Scientific Manpower Commission. Dr. Lawrence B. Heilprin, Council on Library Resources, who, a number of years later, was co-investigator with me on the CICP study, worked with me to call this conference. Dr. Meyerhoff later was to be elected President of CICP when it was incorporated.

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1 I think three paragraphs from the invitational
2 letter may interest this Commission, for they clearly
3 show recognition of the problem; the need for a solution;
4 and the limits within which such a solution must be
5 found.

6 And I quote -- and this is 1959:

7 "Today, we have efficient methods and techniques
8 for rapid reproduction of printed and graphic material
9 which make it easy and desirable for the individual
10 researcher to copy material when and as he needs it.
11 Now we stand on the threshold of automatic storage,
12 retrieval, and dissemination of information. Methods
13 are already available for inexpensive recompilation
14 of articles, papers and monographs. It is a well
15 known fact, today, that scientific information is so
16 fragmented and its sources so diversified, that it is
17 almost a physical impossibility, as well as an
18 economic one, for any group, unless richly endowed,
19 to obtain the necessary permissions to utilize the
20 known copyrighted information, as required, without
21 building and financing a massive library."

22 "New methods, inventions and techniques may
23 solve many of the physical and intellectual problems
24 of handling and disseminating information. The
25 copyright system, as it now works in practice, does

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1 "not permit the unrestricted circulation of information.
2 It is felt that a more efficient way must be sought
3 to administer the system, either through changes in the
4 law or through some structure which will permit the
5 fullest utilization of the present law.

6 "It is felt that the interests of our country can
7 best be served through the fullest interchange of
8 scientific and technical information. With this objective
9 in mind, we are interested in investigating how the free
10 flow of information can be maintained and advanced on
11 an ethical, legal, and efficient basis, without depriving
12 the copyright proprietor of his rights."

13 The next part of my testimony, while it will of
14 necessity continue to be historical, is intended to highlight
15 a number of attempts by CICP to encourage the creation of
16 a clearance system to cope with the growing phenomenon of
17 photocopying, and its potential effect on copyrighted materials--
18 particularly professional journals and monographs.

19 It is true that, in 1960, as some said, there were
20 no data to support our contention that the use of photo-
21 copiers would become very large. Regardless of these detractors,
22 the few who were concerned issued the First Annual Report
23 by the CICP Study Group in May 1960. Shortly thereafter, in
24 September 1960, CICP was incorporated. The full report
25 appears as Appendix A of the 1967 Study by CICP. However,

1 I can note here that, even then, it recognized the most
2 fundamental concern, even beyond copyright, had to be
3 "support of scientific and educational publication". This
4 goal did not change.

5 In retrospect, the essence of the report was a
6 list of eight specifications which were called "Necessary"
7 to a solution of the problem. Only specification No. 3
8 appears to have lost its significance:

9 1. The solution must provide copies promptly -
10 that is, within a time entirely suitable for the needs
11 of the scientist, educator, scholar or student. This
12 time may vary from a few minutes to a few hours or days,
13 The delay interposed by requests for permission to
14 copy should not be prohibitive, or in any way burden-
15 some, as in the past.

16 2. The solution should provide revenues which support
17 scientific and educational publication. This support
18 need not be confined to compensation for loss of
19 circulation, but could be a main source of income.

20 3. The solution should provide multiple copies.
21 The expanding need for the multiple copies in all
22 fields of science and education cannot be met by a
23 solution which provides only single copies.

24 4. The solution should remove the threat of infringe-
25 ment suit for copying for nonprofit scientific or

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1 educational purpose, where the suit is based only
2 on economic loss of intellectual property. Suits for
3 other purposes would not be affected.

4 5. The solution should not reduce the constitutional
5 rights to their intellectual property vested in
6 copyright owners.

7 6. All individuals or groups interested in the solution
8 should participate in it, beneficially.

9 7. The solution should not adversely affect the
10 rights of foreign publishers and copyright owners
11 entitled to protection under the Universal Copyright
12 Convention to which the United States is signatory.

13 8. The solution should require no legal or administra-
14 tive measures which are highly impractical to carry out.
15 For example, the solution should not require that the
16 administrators of the Copyright Law, or any agency
17 involved in the solution, distinguish between copyrighted
18 scientific or educational works and other copyrighted
19 works. To have to define and weigh the ideas in copy-
20 righted works would be operationally unfeasible.

21 From an analysis of these specifications, we concluded
22 that a voluntary clearinghouse was necessary to any solution
23 within the constraints of copyright law.

24 The organizers of CICP--important representatives of
25 the library, science, scientific publishing, educational,

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1 and information science communities were determined to be
2 spokesmen, not advocates. Unfortunately, our determination
3 was insufficient to maintain an atmosphere conducive to
4 problem solving. During later expanded meetings of CICP,
5 as well as at seminars sponsored by established associations
6 and societies, rancor and posturing were substituted for
7 wisdom. There was a time -- between 1960 and 1970 -- when
8 each community thought it could solve its own problem without
9 the cooperation and good will of the others involved in the
10 information transfer process. Williams and Wilkins bears
11 witness to the falseness of this viewpoint.

12 It still puzzles me that we frequently refuse to see
13 the obvious. We are afraid to act without data. Too often,
14 as in this case, the availability of data may mean that
15 the problem has deteriorated to the point where solutions are
16 too costly; may be of limited benefit; and, in fact may
17 not work. Since I am an optimist, I don't want to detract,
18 now, from the commendable efforts of the CONTU and the
19 National Commission on Libraries and Information Science.
20 I just think it is a pity that they were not created ten or
21 fifteen years ago!

22 CICP went dormant from 1961 until 1966, although its
23 directors and officers wrote, spoke, testified, and pleaded
24 that something must be done; meanwhile photocopying machines
25 proliferated. During this period, very few scientific pub-

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lishers seemed to understand or care about what was happening.
We received grants of \$30,000, primarily from the Xerox
Corporation and IBM--no strings attached. I will just skip a bit
of this.

In 1966, still young, daring and full of hope, I
resigned my position as Vice-president of a small information
science corporation to become fulltime Executive Director
of CICP. I was sufficiently persuasive to convince the
Director of the Bureau of Research, Office of Education, U.S.
Department of Health, Education and Welfare, that the Office
of Education had a stake in the copyright problem. With
another \$20,000 available, Dr. Heilprin and I began what
is now known as the CICP Study. The results of this
study are well known, and though they have been challenged,
appear to be standing the test of time.

Another part of the history will be in the printed
material that you can read. I would just like to note that
we were requested to put in another proposal. The proposal
was for \$181,000 to do a much expanded kind of research,
and to design what one might call a clearance system.
Williams and Wilkins came along, with the history of
this written in the science article that is attached.

I would like to say, though, that Mr. Kamenstein
-- when he was asked by a reporter why the second study
was not permitted; and because there was some question about

1 the validity of our data if we wrote beyond the data in the
2 study, and so forth -- Mr. Kamenstein stated that it was:
3 "The best we've seen on what's actually happening" with
4 respect to reproduction of copyrighted materials.....
5 " * * * probably the only organization that has tried to
6 stay neutral, between the opposing sides" "CICP
7 has tried to look at the situation and get at the facts".

8 Frequently, the most exciting part of history is its
9 footnotes: A footnote to this story is the set of agreements
10 (Appendix III) signed by CICP and the American Society for
11 Testing and Materials (ASTM); and CICP and 53 corporations
12 in 1967, to gather data about the extended use of ASTM
13 publications by photocopying.

14 ASTM is an international, privately financed, non-
15 profit, technical, scientific and educational society,
16 primarily engaged in publishing standards of test, and so
17 forth. More than 60% of its income was at that time de-
18 rived from Books of Standards and similar works. The copy-
19 right is vital to the Society's solvency. The agreement
20 between CICP and ASTM made CICP an agent of ASTM for the
21 purpose of granting permission to users of ASTM publications
22 to make extensive use by copying of ASTM Standards for a
23 period of two years, free of any possibility of an infringe-
24 ment suit. In turn, the user was required to become a
25 member of CICP for the small sum of \$50 per year. Part of

1 CICIP's agreement with ASTM was that both parties to the agree-
2 ment would endeavor to have other publishing societies
3 participate in the effort, through similar agreements. In
4 fact, negotiations were under way with several other major
5 publishing societies, by the spring of 1968.

6 Both agreements -- the one between CICIP and ASTM,
7 and the moratorium and membership agreement between
8 ASTM and the participating corporations -- explicitly stated:
9 " * * * upon completion of the study, ASTM and CICIP pledge
10 that they shall endeavor to establish a clearinghouse, open
11 to all publishers and users, to administrate an equitable
12 system of permissions and payments."

13 And this, I may note, was in line with a
14 comment of Congressman Kastenmeier at the time we were asking
15 the private sector to try to do something about the problem.
16 And this was an attempt to do it in the private sector.

17 JUDGE FULD: When was this?

18 MR. SOPHAR: This was in 1967, sir.

19 So the record is quite clear. In 1967, the elements
20 of a clearinghouse had, in fact, been brought together by
21 agreement between CICIP and one of the strongest U.S. and
22 international professional organizations as sponsor. Contrary
23 to conventional belief, we do not usually organize as a
24 result of careful planning but, rather, because of threat,
25 crisis, accident, or fortuitous circumstances. In the case

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1 that I just related, it was fortuitous circumstance that urged
2 these agreements into being; I can only hope it can happen
3 again.

4 King Research, Inc., is now doing a study to
5 "Analyze Library Photocopying and Test the Feasibility of
6 Royalty Payment Mechanisms" for NCLIS. It, essentially, takes
7 off where CICP stopped. I can think of no individual I
8 would rather have carry on the aborted CICP effort than Don
9 King. I am pleased that I was able to provide NCLIS with
10 some of the basic data required to write the RFP and that
11 virtually every concept and idea expressed in CICP's Certi-
12 ficate of Incorporation, the First Annual Report and Study,
13 and the aborted proposal are now considered valid assumptions,
14 or proper areas for investigation.

15 If the King Study concurs with the now generally
16 accepted notion that a clearance system -- sometimes called
17 a system of access, permissions and payments -- is feasible,
18 and a design for one is outlined, I predict a long period of
19 wrangling and battle. To this day, there is little under-
20 standing, among librarians in general, publishers in general,
21 users in general, and authors in general, about how harmful
22 they have been to one another. The spokesmen for these
23 communities have a shameful record of exhorting their
24 constituents to oppose any cooperation with one another;
25 intransigence as to position and false leadership. In general,

1 they have encouraged stonewalling as opposed to cooperation.

2 At this time, I can see no near-term overall solu-
3 tion to the legal and economic problems of information dis-
4 semination caused by modern duplication and dissemination
5 systems, because of a number of impediments. Technology,
6 as usually is the case, is far outstripping any and all
7 attempts to adjust the law and the classic models of
8 marketing information to the new environment. Unless the
9 impediments are dealt with, solutions to copyright problems
10 will continue to evade us.

11 I believe that the most fundamental impediment
12 to any foreseeable solutions to many current problems is
13 that we have been unable to separate particular areas and
14 kinds of information from the larger world of information.
15 Periodicals, abstracts, indexes, monographs and, to some
16 extent, data banks, are treated by copyright law the same
17 as all other published and printed materials.

18 For example, a newspaper or a popular magazine is
19 entitled to the same benefits under the copyright law as is
20 a professional periodical; a publisher, like the American
21 Society for Testing and Materials, has the same set of
22 rights -- no more and no less -- in its published property
23 as does the owner of a copyrighted cookbook. I shall come
24 back to this matter later.

25 Another -- and almost equally fundamental --

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1 impediment to our search for solutions, is the almost
2 total abrogation of responsibility for finding them, by
3 both government and the private sector--until very recently;
4 the Commission is less than two years old, and the NCLIS
5 Request for Proposal was issued less than one year ago.
6 The technologists and the scientists who are responsible for
7 the creation and development of modern information transfer
8 methods, have rarely met, in any effective sense, with the
9 lawyers, the economists and business managers, to examine the
10 kinds of problems which are obviously common to both.

11 Beryl L. Crowe, in his excellent article, "The
12 Tragedy of the Commons Revisited", in Science, 28 November 1969,
13 reexamines the theory of the Commons as Hardin had done
14 earlier in his examination of such contemporary problems
15 as population and environmental corruption. They both point
16 out that our most critical problem areas are those shared
17 by the natural scientists and the social scientists. It
18 is these very subsets of problems which each group avoids--
19 by simply stating that they are beyond their area of speciali-
20 zation and competence.

21 The legal and economic problems of the information
22 transfer process do not have the catastrophic potential
23 inherent in the kinds of problems Crowe was considering.
24 Nonetheless, they are far more serious than anyone would
25 believe for the moment and, more importantly, the kind of

1 attention they have received.

2 Perhaps a closer look at the theory of the commons
3 as a social institution will be of help in understanding
4 the impediments and resultant failures of the few attempts
5 that have been made to come to grips with economic and
6 social problems inherent in information ^{dissemination} systems.

7 The theory of the commons recognizes that
8 " * * * there are some environmental objects which never
9 have been, and never should be, exclusively appropriated
10 to any individual or group of individuals." Some of the
11 usual kinds of common's property that will come to mind
12 are water, grazing land, atmosphere and living space.
13 There is still another kind: information. I submit that
14 one of the reasons that there has been this problem is
15 that information has not been recognized, in that sense,
16 as a common property, until recently.

17

18 In fact, information is quite different than
19 other kinds of common's property in that it is not subject
20 to erosion from overuse. Instead, it can be duplicated
21 perfectly and transmitted with ease. It proliferates.
22 It does, however, usually age fast. Thus, its utility and
23 value are often transient. Because we don't know what to
24 do about this ephemeral aspect of some kinds of informa-
25 tion, we treat its proprietary aspects equally. Thus, under

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1 copyrighted law, the journal, for example, and the novel, are
2 given the same term of protection. We do know, however, that
3 85% of the material copied by libraries is less than five
4 years old and 90% is less than ten years old. Perhaps there
5 should be a lesser term of copyright for such scholarly
6 publications as journals.

7 Legislation, intended to protect the estates of
8 creative writers, is fine; but extending this concept to
9 all kinds of works is regressive. I think that the need to
10 protect the journal from copying abuse is essential --
11 within a very short time frame.

12 Because the age/value relationship is avoided or
13 not understood, we have another serious impediment. In
14 this case, we tend to accumulate an endless pile of protected
15 items in which the proprietor has no interest because of
16 its small value.

17 JUDGE FULD: That is all established now?

18 MR. SOPHAR: Yes, But I understand we are
19 testifying to the Commission for the future, so I have
20 taken that into account, sir.

21

22 A contiguous problem -- one that is even less
23 understood, if recognized at all -- is the question of how
24 we shall continue to fund the information transfer process
25 in the new environment of easy duplication and facsimile

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1 transmission. This approach to the problem is larger than
2 the proprietary rights versus user rights approach to the
3 problem. The problem, I believe, was identified more than
4 five years ago by Ben Weil. The importance of this viewpoint
5 is that it makes the position of the author and the
6 publisher more compatible, as regards their attitude towards
7 copying.

8 Cheaper goods, if they have the same utility,
9 will always drive out the more expensive goods from the
10 market place, unless their production or availability is
11 controlled. When the imitation, the useful substitute,
12 the copy, if you will, is cheaper than, "better than", or more
13 available than the original -- as in the case of photo-
14 copies of journal articles and, eventually, in the case of
15 facsimile -- the original will also be driven from the market
16 place. Normally, this is a general economic good, though
17 the less efficient producers may not appreciate that they
18 are forced out of business by the efficient producers.

19 As consumers, we want the best or the most for
20 the least price, regardless of who is hurt; as producers, we
21 want to continue to produce our products or offer our services
22 and never be hurt. In general, we do not get too disturbed
23 by these apparent contradictions.

24 However, as consumers and users of published
25 periodicals, we do have reason to be disturbed. In this case,

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1 we may be driving the more costly product--i.e., the
2 periodical, the text, and the monograph--out of business.
3 Although they are very expensive and only partially and
4 occasionally used, they are the only source from which
5 copies can be made. A portrait photographer would have
6 a tough time making a living if there were no people!

7 Random, as well as organized, copying, will not
8 exist when there is nothing to copy. The resource--in this
9 case the periodical--must continue to be funded, by the user,
10 in some way. In other words, the strongly-held idea that
11 information in its various graphic forms has always been
12 free, and should continue to be available at no charge, is
13 an impediment that stands in the way of adjusting the
14 economic aspects of information distribution to the
15 potential good inherent in available technology. As a matter
16 of fact, information never has been free! Someone, or some
17 organization, has always paid for it.

18 It can be, and has been argued, that the demise
19 of the periodical would be no great loss. A system of
20 separates would replace it. This may be so; but the problem
21 of funding would remain. In fact, it could be more serious.
22 It is no accident that the American Society for Testing
23 and Materials as publishers of separate standards has been
24 more concerned about photocopying, and the violation of its
25 copyrights, than most of the periodical publishers.

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1 Fictitious beliefs are also impediments standing
2 in the way of reasonable solutions to the many legal
3 and economic problems which must be overcome to take full
4 advantage of the potential inherent in the technology of
5 duplication and facsimile transmission. I want to identify
6 three such fictions. I am certain there are more.

7 The first of these fictions is that the copying
8 problem is largely the concern of the commercial publishers,
9 despite the concurring viewpoints of a few publishing
10 societies, such as the American Chemical Society, the
11 American Institute of Physics and ASTM. This, of course,
12 is a membership, not a management viewpoint. Professionals,
13 for the most part, are concerned with access and low cost.

14 The truth, of course, is that the legal and
15 economic problems which concern the whole process of informa-
16 tion must concern all of its parts; as well as all the kinds
17 of parts. Thus, the not-for-profit publishers should have
18 equal concern with the commercial publishers about the
19 economic changes caused with the use, or potential use, of
20 modern duplication and dissemination systems, and storage
21 and retrieval systems.

22 The second fiction is that single-article copying,
23 passing under the euphemism of fair use, is not harmful
24 to the well-being of a publication -- and I recognize, also,
25 the new legislation.

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1 I want to return once again to Hardin and Crowe
2 and the theory of the commons. The following is a direct
3 quote:

4 "The cause of this tragedy is exposed by a very
5 simple mathematical model, utilizing the concept of
6 utility drawn from economics. Allowing the utilities
7 to range between a positive value of one, and a
8 negative value of one, one may ask, as did the
9 individual English herdsman, 'What is the utility
10 to me, of adding one more animal to my herd that
11 grazes on the commons?' His answer is that the
12 positive utility is near one, and the negative uti-
13 lity is only a fraction of minus one. Adding together
14 the component partial utilities, the herdsman
15 concludes that it is rational for him to add another
16 animal to his herd; then another, and so on. The
17 tragedy to which Hardin refers develops because
18 the same rational conclusion is reached by each and
19 every herdsman sharing the commons."

20 Isn't this exactly what is happening when each and
21 every one of us copies at will?!

22 The third fiction is that we are on the verge of
23 a national information network system. The technologies of
24 duplication, of facsimile transmission, of automatic searching,
25 of switching, and of interactive remote questioning of data

1 bases are available. Only the architecture is needed. The
2 truth is that organizational, financial, general economic
3 and legal, and, yes, copyright problems, will prove to be
4 greater impediments to networks than technological constraints.

5 Finally, I offer to the Commission one concept, and
6 one observation. The concept which I have discussed with some
7 of you in the past is based on the idea that a system of
8 access, permission and payments must have an integral part
9 to it, which I call a system of access and permissions to titles
10 without payments. In its simplest form, I envision a
11 periodical publication of the Copyright Office which lists,
12 under various categories, the kinds of, and situations
13 under which, the copyright proprietor permits copying. The
14 declarations would be made upon registration; be revokable
15 periodically; and have the force of law. Above all, I
16 believe something of this sort is necessary to make a
17 clearance system workable. The idea is written out in
18 fuller detail, and attached as Appendix IV.

19 The observation is that most of the considerations
20 about protection of, or use of, computer-stored information is
21 based on the legal and marketing studies of conventional
22 publications. In fact, I don't believe that either the
23 data base suppliers, retailers, or users, have a reasonably
24 clear idea of the copyright needs, limitations of use, or
25 users' rights in this area. This is a far tougher problem

1 than photocopying ever presented to copyright law. I hope that
2 this technological advance does not, also, get out of hand.

3 I have not had the time to check my remarks with
4 Larry Heilprin, my co-worker, disciplinarian, and friend
5 who worked with me over the years in the copyright arena.
6 I hope you call him to testify. Also, the Commission could
7 do well to request Dr. Howard Meyerhoff, President of CICP
8 during its lifetime, to testify. He, more than any top level
9 scientist I have known, understood the significance of
10 copyright, and its importance to professional publications.

11 Thank you for your patience.

12 JUDGE FULD: Have you testified before the
13 Congress, or before the Subcommittees of Congress?

14 MR. SOPHAR: During the early hearings in 1966 and
15 1967.

16 JUDGE FULD: You did not testify since that time -- at
17 the recent hearings?

18 MR. SOPHAR: No, sir. I did not have the
19 opportunity. I felt under certain constraints. As a matter
20 of fact, it was not until Dr. Farley became Librarian that
21 I felt sort of free. He is that sort of a gentleman.

22 JUDGE FULD: Have you made photocopies of what
23 you have given us?

24 MR. SOPHAR: I have the material here, sir.

25 JUDGE FULD: You mentioned the hard-nosed attitude

1 of the conflicting camps -- the publishers and authors on
2 one hand, and the librarians on the other.

3 MR. SOPHAR: Yes, sir.

4 JUDGE FULD: For the record, I want to state
5 that those who have come from those camps, and have served on
6 the Commission, have been most attentive to the views of
7 the others.

8 MR. SOPHAR: It is a new world. I understand.

9 Was it always so, though?

10 MR. LACY: It is true.

11 MR. NIMMER: Would you care to trace, for us, with
12 some broad strokes, your current ideas as to what you think
13 would be the most feasible kind of clearinghouse?

14 MR. SOPHAR: All right. I will try with broad
15 strokes.

16 I think (a), it should be a joint membership.
17 Again, I must say that I understand -- although not being an
18 attorney -- that there are legal impediments when too many
19 people get together, and you will excuse me if I violate
20 some of these principles.

21 I believe that, almost like the Commission, it has
22 got to be made up of the publishers -- commercial and otherwise;
23 the authors and, more or less, the scientific --

24 MR. NIMMER: Let me interrupt you.

25 MR. SOPHAR: Yes, sir.

1 MR. NIMMER: Are you assuming, then, a body which
2 is "private", rather than a public clearinghouse?

3 MR. SOPHAR: Yes, sir.

4 MR. NIMMER: Is that your first thought -- that it
5 is preferable, or feasible, to have a "private" versus
6 a "governmental"?

7 MR. SOPHAR: I think, in our society, we certainly
8 should always try for the "private"; and the government
9 should come in -- and this is what I think was one of
10 the tragedies: That the government, sooner or later, has
11 to move to correct the situation if the private sector
12 does not take care of it. And it is just on that basis, alone,
13 that I believe a privately-operated clearance system would be
14 preferable.

15 MR. NIMMER: I assume also, though, that the
16 aspect of feasibility is such that if you think it is at
17 least sufficiently likely to be feasible, that it is worth
18 going forward on, on that basis?

19 MR. SOPHAR: Yes, sir. I think if we were started
20 once -- even if it was aborted -- it could be begun a second
21 time.

22 I should also mention that the question of being
23 sure as to what kinds of materials are considered by the
24 clearinghouse; is of vital importance, because I can also
25 see, without economic studies, that if you have every kind of

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1 publication in it, and deal with every minutia, it is going
2 to drag down the significant good that might come from such
3 a clearance system.

4 One of the problems, possibly, with a government-
5 controlled, public-controlled corporation of such a type, is
6 that they might not be able to be as selective -- as to what
7 kind of publications and who participates in it, by its
8 very nature -- as can be a private system; or a private
9 clearinghouse.

10 MR. NIMMER: Well, if, as you implied earlier, we
11 are thinking about -- if our conclusions are not necessarily
12 going to be limited by the existing or even the new thought-
13 to-be-existing law, but we can recommend any formulation
14 we want --including any changes of law -- that could be
15 taken into account and cover only journals, or whatever --
16 if that seems appropriate.

17 MR. SOPHAR: And I think the history shows quite
18 clearly; the testimony -- I don't recall all of it, obviously --
19 over the years -- that basically, in the end, while we talk
20 about copyright -- and there are other areas -- the reason
21 for this Commission's existence and the huge part of the debate
22 has been the small segment of the world of copyright, you know,
23 in scientific and technical publications.

24 MR. NIMMER: Passing the question of private or
25 public, and who is running the clearinghouse per se, what about

1 the problem of administering and keeping track of how much
2 is used; and what is being used?

3 MR. SOPHAR: I think that has been a much overdone
4 problem. I think it is sand that has been thrown in the eyes
5 of people-for whatever reasons.

6 We have the most complex transaction systems going on --
7 I am not talking about cost, now -- the most complex transac-
8 tion systems imaginable going on in all parts of the United
9 States.

10 We have it in the Department of Agriculture; we
11 have it in the Department of Commerce. There are thousands
12 and thousands of record systems. That is one of the
13 things that Mr. Miller is concerned about when he talks
14 about privacy: that record keeping is not possible. With
15 modern technology, I think that is ludicrous.

16 MR. NIMMER: Did you say you are excluding considera-
17 tions of cost?

18 MR. SOPHAR: I was answering this one part.
19 I said that one of the answers -- one of the statements --
20 that I used to hear all the time, was, "The system cannot
21 be designed."

22 That was responsive to that part of it.

23 MR. NIMMER: Now, would you throw in the component
24 of cost?

25 MR. SOPHAR: Of course you have to throw it in!

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1 Sometimes, in arguments, I used to feel like a
2 fighter. You would answer one and somebody would
3 be hitting you from another side with another
4 set of arguments.

5 MR. NIMMER: Your answer was responsive but,
6 obviously, it is not the whole picture, because any viable
7 system has to take into account: cost, obviously.

8 MR. SOPHAR: Yes.

9 MR. NIMMER: Maybe this is not a fair question.
10 But do you have any thoughts in mind as to how to model a
11 system that would be not only technologically feasible, but
12 also economically feasible?

13 MR. SOPHAR: I only see two possible models and
14 we suggested one earlier, I see that it is now changed
15 to transaction by transaction. It was a statistical
16 model. In other words, payments would be based on the past
17 history of the use of any particular journal or journals of
18 any particular publisher, very much like the ASCAP thing --
19 it is the same thing. On the other hand, payments to the
20 clearance system would be on ^{the} / basis of uses determined
21 by certain organizations, both public and private.

22 It seems now that there is more talk about it
23 going on the transaction by transaction basis.

24 All I can say, sir, is that one of the things
25 that I never had a chance to go further on -- and one of the

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1 things I wanted to do--was to actually look at that. Ob-
2 viously, some of that is going to be done. It would be wrong
3 for me to conjecture which is best, because we did not know, at
4 that time. All we could say was "clearance system", and
5 see certain parts. You have to receive money in; it had
6 to go through some central administration; and money has had
7 to go. Really, that is about all we could see. And that did
8 not take any great thinking. And that is why we want to go
9 on from there.

10 JUDGE FULD: The gentleman in the third row?

11 MR. PRICE: Douglas Price, National Commission on Libraries
12 and Information Science.

13 Point of clarification:

14 The study,--the royalty payment feasibility
15 test incorporated in the study--is transaction by transaction
16 --not "per transaction". You have carefully modified
17 that, as to transaction base. I mean, it is a statistical
18 sampling, and would not include that.

19 JUDGE FULD: Mr. Wedgeworth?

20 MR. WEDGEWORTH: Just a couple of questions.

21 I am interested in your statement earlier that you
22 thought that it was inappropriate for you not to make any
23 distinctions between the various types of publications,
24 and I just would like for you to clarify it for my own mind--
25 because I cannot get these two parts together.

1 In one area, I heard you say that it was
2 inappropriate to differentiate between these various types
3 of publications as a necessary requirement for a clearing-
4 house.

5 Then, later, I thought I heard you saying that
6 there needed to be some differentiation between the various
7 types of publications.

8 MR. SOPHAR: When I wrote it, I knew I did it.
9 You are very astute!

10 The first was a statement of 1959 as a result
11 of the first Annual Report of CICP, which I read.

12 I have changed my thinking; and what I said at
13 the end is what I believe now.

14 This was a group statement -- the way we looked
15 at it in 1959. But you caught it!

16 MR. WEDGEWORTH: It is not so much that. I
17 would really like some indication as to why you think
18 there ought to be distinctions in protection.

19 MR. SOPHAR: I think the properties of the materials
20 that we are talking about, over and over again, are quite
21 different, in the end, than the properties of the latest
22 detective story, or book on Art, or many, many other kinds
23 of literature.

24 While part of the property is physical -- it is
25 printed; it is bound, it has numbers or letters in it --

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1 the use of the property is quite different.

2 That is one thing.

3 The other thing -- and many studies have shown
4 this -- is that the information is -- barring the rare paper
5 when somebody has to write a dissertation -- the informa-
6 tion is transitory, except for that rare document. I
7 think you will agree with that, as a Librarian.

8 Thirdly, if we want to have a clearance system:
9 to think in terms of a clearance system for all
10 copyrighted materials is quite a problem. I am sure
11 the commercial publishers are just guessing. They can go
12 on with their ordinary permissions -- internal in-house
13 permissions' offices, and systems, and whatever they use --
14 for more substantial kinds of copying. I think it is a
15 unique problem caused by unique kinds of materials.

16 There are, still, not many people going around
17 and copying material from novels or historical works, or
18 anything else like that.

19 MR. NIMMER: What about the argument that if the
20 use life is smaller on scientific grounds, or if there
21 isn't as much photocopying of novels, or what-have-you,
22 then that, in itself, answers the problem.

23 That is, if use life is smaller, you don't
24 need a shorter copyright term for scientific journals
25

1 because, later, there is not going to be any substantial
2 copying, anyway. So it is irrelevant whether it is
3 copyrighted or not.

4 MR. SOPHAR: Yes, except that the individual --
5 well, fair use covers everything in some people's minds.
6 At least, I was not going to be caught. So that has its
7 equivalent.

8 Secondly, the fact that there is a new Bill --
9 at least, we don't have to deal with what was meant in
10 1909. We are dealing with what was said in 1976, until
11 some people, thirty years from now, ask what was meant.
12 The fact that a Commission exists, certainly makes people,
13 users, and libraries, (academic, government and industry -- and
14 remember
15 there is often a tremendous amount of concern, as Mr.
16 Weil testified, or will testify, in the industrial sector.)
17 And the fact that, now, there are groups watching what is
18 going on might cause just the opposite thing to happen.

19 Somebody will look at a piece of copyrighted
20 material and say, "I don't dare make a copy of an article
21 from this journal of the Lower Silesia Entomological
22 Society," It might be some insignificant journal, yet
23 somebody wants twenty-five copies. And you can't even find
24 the owner!

25 JUDGE FULD: Do you think it is realistic that

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1 Congress would change the term at this point?

2 MR. SOPHAR: I don't have the wisdom of selling
3 you people on this. But I don't see why the Congress
4 cannot do anything it wants to do.

5 JUDGE FULD: So you think it is realistic?

6 MR. SOPHAR: I think it is very practical.

7 I am sure, if you sat down with them as individuals
8 -- I just -- it does not seem to me "hammering". That
9 is all.

10 MR. NIMMER: Go back to the Lower Slabovian
11 journal. I understand what you are saying: that
12 although there is not much demand, somebody is going to
13 want to do it but, if that work is included in an overall,
14 compulsory, licensed clearinghouse situation, then even
15 though it will be rarely used and hence will be very little
16 of a burden on the clearinghouse, occasionally, when
17 somebody does want to use it, he won't be frightened off
18 from using it if it is included within a compulsory-
19 license type operation.

20 MR. SOPHAR: I suggest it's the other way.

21 I could see your logic; but you talk about
22 administrative costs, and, you know how the statements
23 about the quantities of existing journals vary all the way
24 from 20,000 to 100,000, and places in between; and nobody
25 really seems to know.

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1 Would it want to carry in the clearinghouse
2 as members, every journal or every publisher that publishes
3 some kind of a periodical?

4 You see, what I am afraid of is the clearinghouse
5 now breaking down because of all of the people -- all
6 of the groups - it services -- then saying, "It did
7 not work."

8 MR. NIMMER: I am not sure of the answer to that!

9 MR. SOPHAR: No; nor am I!

10 MR. NIMMER: But if a given journal is a member
11 of a clearinghouse, but the uses of that particular journal
12 are very minimal, then is it likely still to be a great
13 burden on the clearinghouse to have that journal a member?

14 MR. SOPHAR: Once it is registered, possibly
15 not.

16 MR. WEDGEWORTH: I have another question that
17 is related to the journal.

18 You are talking about differentiating the copy-
19 right term.

20 My question would be: Would it be worthwhile to
21 reduce the copyright protection available to the
22 professional or scholarly society that publishes that
23 journal -- probably publishes it at a deficit?

24 Would it be worthwhile to reduce their protection,
25 and thus deprive them of the opportunity to reprint copies

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1 of classic articles that may have an extended life beyond
2 that which would be the normal use-life of the average
3 article in that journal?

4 MR. SOPHAR: This is why I have offered, very
5 briefly here, the alternative -- but expanded -- registry
6 of titles, where you could go the other way -- have full
7 terms. But the owner of the copyright could, on some
8 checklist based on some categories that were pre-determined:
9 "Out of 25 or 30 categories, copying may be done after
10 one year; copying may be done after five years; twenty
11 copies -- " whatever they might be. Classification is a
12 game that we all play. Then, they could revoke this at
13 any time. You see, they could control this.

14 MR. WEDGEWORTH: So then you would have the
15 Register of Copyrights publishing not only a publication
16 that would list the terms and conditions under which certain
17 journal titles were available for photocopying but, also,
18 a second list of exceptions to those general conditions?

19 MR. SOPHAR: Yes, sir.

20 MR. WEDGEWORTH: Under which each journal was
21 published, multiplied by the hundreds of thousands of
22 journals that are available and copyrighted?

23 MR. SOPHAR: And I can see where this would have
24 the force of law -- if this were permitted -- because it
25 would be a declaration. Appropriate legislation would be

1 written through the Register's Office, and you make this
2 declaration to the world at large.

3 People have come back -- if I may say this --
4 and asked "Can we publish this in the journal?"

5 Then (a), "It is not revokable", is the point you
6 make, and

7 (b) That creates another burden for the
8 Librarian, if they get the periodical from the stacks--
9 if it happens to be there.

10 So there is a real waste.

11 Whereas, if you have the publication in front
12 of you and somebody asks you for the copy, or for a photo-
13 copy, you say, "We can do this", or, "We can't do this."
14 At least, they can make a rational decision.

15 MR. WEDGEWORTH: If you consult all of these
16 listings that the Register of Copyrights Office publishes,
17 this would also have to be cleared by the clearinghouse
18 in checking on the billing, for any individual library,
19 for that particular time period.

20 MR. SOPHAR: Yes.

21 MR. WEDGEWORTH: Just one final point.

22 I noted that in your analogy about the herdsman,
23 that you seemed to contradict yourself in saying that
24 information cannot be used up, because the implied
25 conclusion to that analogy was that there was something that

1 was being depleted.

2 MR. SOPHAR: No! I said that there are funds
3 being depleted by this activity. That is what I meant. It
4 is no secret.

5 MR. WEDGEWORTH: Somebody is paying, but the
6 benefits are not going --

7 MR. SOPHAR (Interposing) Yes! This is
8 information business that we deal with; and you deal with,
9 every day. One of the biggest problems is that we are
10 used to dealing, even in publishing, with physical property--
11 or some service--and we always try to equate it, and rarely
12 want to recognize that these differences are, maybe, more
13 significant than the similarities. And that is why
14 I set the warning on the basis -- the information data
15 basis -- where you can see paper after paper where the
16 economics are being studied more as if it were just another
17 kind of publishing venture.

18 MR. WEDGEWORTH: I would emphasize, wholeheartedly,
19 your conclusion that our problems with all of these
20 arrangements are the various financial, organizational,
21 problems that are likely to come up--including copyright.

22 MR. FRASE: Mr. Sophar, going back to this question
23 of announcing policy about copyrighting listed by the
24 Copyright Office, you touched on the fact that a suggestion
25 has been made that this announcement be put into the Journal

1 itself.

2 MR. SOPHAR: Yes.

3 MR. FRASE: And you said that this would have
4 the difficulty of not being able to change.

5 But how serious is that?

6 As the owner of the copyright, if you change
7 your mind, you could then, in your next issue, print
8 a different policy.

9 MR. SOPHAR: Yes.

10 MR. FRASE: But you could not, retroactively, change
11 the earlier issue?

12 MR. SOPHAR: Not retroactively -- somewhat in
13 response to exactly the question that Mr. Wedgeworth
14 asked, which I foresaw when I came up with this concept.
15 "Boy, I really have a winner here. I thought nobody gave
16 a darn, but it's a winner!" That has happened! And now,
17 I feel I have given it to the world! It does not happen
18 to be an article; it happens to be a book. But, let's say,
19 for the sake of argument, it was an article. I don't
20 know if it is your company: Zero Based Budgeting, written
21 two years ago by a man named Farrett?

22 They must be reprinting that thing like mad!

23 Now, can you imagine?! It could have been some
24 article in a business journal that nobody gave a darn
25 about, and you could see the opportunity of running it and

1 and saying, "We are going to have a separate press run,
2 and put it between hard covers", and what-not.

3 So it is this kind of thing -- and there are
4 a great many other situations -- compilations.

5 JUDGE FULD: Any other questions?

6 (None)

7 Thank you Mr. Sophar.

8 MR. SOPHAR: Thank you.

9 JUDGE FULD: We will recess, now, until 1:30.

10 (Whereupon, at 11:45 o'clock, a.m., the meeting
11 was recessed until 1:30 o'clock, a.m., on the same day.)

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- AFTERNOON SESSION -

JUDGE FULD: Dr. Edward C. McIrvine, Manager of Technology Assessment, Xerox Corporation, will now address us on the present and future technology of photocopying.

Before holding that position, he was Director of Forward Technical Planning, Corporate Research of Xerox. In that capacity, he was the principal staff member in long range technology planning.

Dr. McIrvine, the Commission is delighted to have you with us.

STATEMENT OF DR. EDWARD C. MC IRVINE,
MANAGER, TECHNICAL ASSESSMENT, XEROX
CORPORATION

on
FUTURE TECHNOLOGY OF PHOTOCOPYING

DR. MC IRVINE: Thank you, Mr. Chairman.

Members of the Commission: There is a practice, I believe, among historians now-a-days, that, rather than to pretend to be speaking with no bias, to simply announce at the beginning of each history book what their particular posture and biases are, and allow the reader to disentangle their biases from the factual material that is presented.

Perhaps I might mention that, in my twenty years of industrial experience, I have obviously picked up some biases--having been initially trained as a physical scientist,

1 and having been active in research as a theoretical
2 physicist. I gradually found myself moving from that
3 realm into the realm of information science activity,
4 simply because of the evolutionary process of the informa-
5 tion technology environment.

6 Therefore, I carry with me a great deal of
7 intrinsic interest in the rapid evolution of what I
8 consider to be the dominant aspect of technology in the
9 latter part of the 20th Century but, at the same time, I
10 have had roles over the years which have also continually
11 kept me in contact with physical science - which is, after
12 all, the underlying technology for the artifacts that we deal
13 with.

14 I am going to try to comment, today, on
15 reprographic technology in the context, therefore, of
16 evolving information-systems usage; at the same time,
17 discussing some of the near term status of reprographic
18 technology, itself.

19 I am not an expert on sales distribution and
20 customer interface. However, I am familiar with some of
21 the technological determinants; and the way these will
22 evolve over time and, therefore, affect the way that
23 customer interface will, of necessity, find itself in the
24 future.

25 I am going to talk, really, in several sub-

1 divisions today and, for clarity, perhaps I should name
2 them first. I will speak about information science, itself.
3 I will speak about reprographics, and this will mix both
4 technology and some observations about the way the industry
5 has evolved.

6 I am going to mention a potential royalty account-
7 ing system.

8 I am going to speak, briefly, to the issue of whether
9 it is possible to automatically recognize copyrightable
10 material in a reprographics environment.

11 I am going to conclude with some comments on
12 future systems extensions as I see them likely to occur and,
13 perhaps, summarize in those terms.

14 I think it is important for the Commission to
15 relate the value of copyrighted material to the question
16 of information content in information-theoretic terms,
17 because that is where the eventual technical imperatives
18 are likely to arise, and that is where the coalescence
19 of some of the reprographics technology and other
20 information systems technology will, in fact, first become
21 manifest.

22 Science and technology deal, really, with three
23 physical parameters. We are more familiar with the other
24 two than we are with Information; the other two being
25 Materials and Energy.

1 The third physical parameter is entropy which
2 in fact is equivalent to information in a statistical
3 sense.

4 That latter quantity is not as familiar as either
5 Energy and Material and, in addition, it is not subject to
6 anything like the same fundamental limitations.

7 Some years back, in analyzing the future
8 of transportation systems for one of my former employers,
9 I did a comparison of the fundamental limits in terms of
10 energy utilization; the fundamental limits in
11 terms of materials parameters; and then observed that,
12 by contrast, information systems were ten - twelve orders
13 of magnitude further from taxing the capacity of the eco
14 system on the surface of the earth. While, in Energy
15 and Materials, we can expect in the future, percentage
16 improvements in information systems; we can see
17 improvements that will be factors of ten -- factors of
18 ten to large numbers; thousands; millions!

19 Information is a measure of a disorder or order
20 of a body of elements. You have, all, been exposed
21 at some time to the concept of measuring information in
22 terms of bits -- this is a terminology which arose out
23 of digital technology context, /which can be generalized
24 to apply to any information system.

25 The thing which often eludes one's intuitive

1 grasp, however, is that there is information within
2 data elements--and within its structure--that transcend
3 the encoded information that is in the language.
4 And this will be very important for the future;and, in
5 fact, is already important in terms of reprographics.

6 So, if I can distinguish between three kinds
7 of information:

8 If I am dealing with coded information --
9 particularly in the digital context -- I have a limited
10 number of options, and it is, in fact, one of the
11 principles of information theory that the information content
12 depends upon the questions that one is allowed to ask, and
13 the number of potential answers that is available.

14 If I know that what I have is represented by
15 an 8-bit character -- commonly known as an ASCII character
16 by the Standard Association that determines the character
17 sets for the digital technology industry, then I have
18 a limited number of opportunities as to what those
19 characters will be. And it will not be Greek data, and
20 it will not be a bold face letter, or a letter with
21 particular serifs. It is not going to be in
22 Baskerville type. It is simply going to be a particular
23 letter of a rather limited set and, therefore, coded
24 information is very economical in terms of the usage of
25 electronic storage--very economical in terms of other usage.

1 If I go one step beyond that and still speak
2 but
3 about textual information/without the limitations of a
4 particular font .-without the limitations of a particular
5 language or character set--then I have a broader context
6 of options. There is more information content in a message
7 that is in text, but without any preconceptions about what
8 that text will be.

9 Finally, if I go one step further and say I am
10 going to present something which is graphical information --
11 which may, in fact, not have a character set involved at
12 all, but which may be in line drawings, which may involve
13 gray scale, which may involve half tone illustrations; which
14 may involve color; which may involve tonal reproduction
15 range of the color. In fact, I am going to open myself
16 up to a complete freedom of context. Then I have maximized
17 the potential information content of a particular document--
18 or a particular record.

19 Consequently, the old saw that a picture is
20 worth 10,000 words is, in fact, dependent upon what we have
21 pre-determined about the context of what can be in that
22 picture.

23 If, in fact, it is going to be 66 lines, 50
24 characters per line on an 8-1/2 by 11 inch page, there will
25 be something like 24,000 bits; and that is, perhaps, comparable
 to 10,000 words.

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1 If, however, I say that I am going to represent
2 an absolutely arbitrary figure on this page - - I am going
3 to view it from normal viewing distance -- then the
4 resolution limit of the eye is, in essence, the only
5 limitation I am placing on the information content and,
6 within that resolution limit - - not counting color --
7 there are, perhaps, 30 million bits of information on the page.

8 That 30 million bits of information is information,
9 in the broadest sense, of Shannon communication theory,
10 or information theory, and only begins to lose its interest
11 at 30 million bits--as we recognize that part of that
12 information is the fiber content of the paper which
13 is showing up in terms of the texture. It is represented
14 in terms of small flaws. It is represented in terms of
15 small pieces of ink that happened on places that were not
16 intended, on the page.

17 These things are generally considered "noise"--
18 not information. in fact--in information-science terms.

19 However, beyond that, there are other aspects which
20 are information--and which have to do with esthetics.

21 I mentioned earlier the question of: What type
22 font are you using?

23 How is this formulated on the page?

24 These again are a part of those 30 million bits
25 of information.

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1 Consequently, we have an interesting divergence,
2 really, in terms of consideration of reprographics where
3 there are no preconceptions other than resolution limits
4 and the potential of color or not-color; and questions of
5 how the gray scale is handled. There is a difference in
6 terms of the limitations on information content that could
7 be characterized by a single record in a reprographic
8 system as opposed, for instance, to a record that is in
9 a conventional computer system, circa 1977.

10 Okay!

11 Let me start speaking, about reprographics,
12 by talking about a few aspects of reprographic technology
13 that really pick up out of information science.

14 First of all, copiers don't "copy". This is
15 related, perhaps, to the observation that cameras do lie;
16 because copiers, generally speaking, use electrophotographic
17 processes. This is, in many ways, parallel to photography
18 technology as used in cameras.

19 Any photographic process or electrophotographic
20 process has characteristics which are non-linear in its
21 reproduction. There is something called the modulation
22 transfer function which indicates--on the basis of the
23 physical parameters of the system--what information from
24 the original will actually get transformed into the
25 output.

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1 There will be material in an original which is
2 below the resolution limit of the process.

3 In addition, if one is dealing with the Xero-
4 graphic process, you deal with a physical process which
5 has what is called, photographically, a high gamma, or
6 a high contrast-enhancement, by nature, and this appears
7 within the equipment-although it can be somewhat tailored,
8 by equipment design.

9 You have probably all had the experience of having
10 a document with typewritten information and then a light
11 pencilled marginal note which, having put it upon the platen
12 of a copier, you discover that the copy, in fact, has enhanced
13 the contrast of that light pencil against the background,
14 and it is easier to read the pencilled comment in the
15 "copy" than it was in the original -- the origin of some-
16 thing which, I suppose, we should look upon with favor at
17 the Xerox Corporation! That is: that some people think that
18 copies are better than originals!

19 In fact, the copy is not! The copy has lost
20 the information content that that was light in the original.
21 But it happens to have utility, because, generally speaking,
22 to read that--and not looking for the information as to
23 whether that was done with a No. 2 pencil, or not.

24 So, functionally, copiers replicate most of the
25 information that is desirable in terms of a textual, or

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1 line copy, environment. And, here, I am making some
2 generalizations because, clearly, we can have special
3 purpose representations of electrophotographic technology that
4 will do other functions better-- at the loss of some of
5 that line copy quality.

6 An earlier speaker, today, mentioned the key date
7 of 1960 for Xerox 914. For those of you who have not
8 heard the history: Twenty two years after the invention
9 of Xerography -- and the interim time is a very
10 interesting one -- but this was, from the very inception
11 by Chester Carlson -- a private inventor -- a market-
12 driven business. It was a classic case of a market driven
13 business, because Carlson -- a patent attorney, himself --
14 decided that he wanted to match the needs of being able
15 to photocopy with less cumbersome methods than were
16 available in the late Thirties, and he systematically
17 examined the technologies that existed in the world, to
18 come up with a combination of technologies that, in fact,
19 could lead to this.

20 While there were intermediate applications,
21 the first automatic office copier was, in fact, in 1960.
22 Since that time, the industry has grown into a multi-
23 billion dollar industry at present.

24 The principal entrants -- just to review these
25 -- are Xerox, International Business Machines, Eastman Kodak,

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1 several Japanese companies, including Ricoh, Cannon,
2 Konishiroku, Katsuragawa, again a U.S. Company: 3-M, and Pitney-
3 Bowes, who utilizes an Océ vander Grinten which is a
4 Dutch Company -- Océ vander Grinten equipment--in part of
5 their line.

6 The marking technology, sixteen years
7 after the inception of automatic copying; marking techno-
8 logic of reprographic units -- is now relatively mature.
9 However, the system technology of reprographics is still
10 what I would classify as a fluid technology, wherein the
11 function may still change.

12 The industry in 1975 can be quoted in terms of
13 size, and I have some figures from the Quantum Science
14 Corporation. Quantum Science is a New York market research
15 and technology consulting firm who has given us their
16 figures for the 1975 U.S. reprographic usage--totally.
17 I asked them, also, for figures on several related fields,
18 to put this into a context, which I will then discuss.

19 Copying -- which they define as being both
20 coated paper and plain paper copiers -- in 1975, led to
21 81 billion impressions in the United States. I use the
22 word "impression" because we count both sides in the
23 event of a duplex copier.

24 Duplicating -- this is offset/ spirit stencil, various
25 multilith operations -- the same year, was roughly 300

1 billion impressions.

2 The Quantum Science figures on micro-publishing
3 -- both roll and microfiche -- that year, would be
4 35 billion frames. In computer printing -- and, in this, they
5 have counted a multi-part form-- they counted each part
6 of a multi-part form. So, again, it is a question of how
7 many sheets come out. They would say 170 billion sheets.

8 Furthermore, their estimate is that the 81 billion
9 impressions made in copying in 1975 would break down into
10 62 billion in rental or leased copiers and duplicators, and
11 19 billion impressions that were made on copiers and
12 duplicators that had been purchased by the user.

13 In a market of this size; and I said I believe
14 the marking technology is relatively mature, so the cost
15 levels are of interest not only for the present, but in looking
16 towards the future.

17 Whereas the Xerox 914 was originally introduced as
18 a nickel-a-copy characteristic pricing, the cost levels
19 -- and, therefore, the price levels -- are lower in terms
20 of higher volume copiers and duplicators. At least Xerox's
21 pricing scheme now goes to a low of six-tenths of one cent
22 for additional impressions at the high volume limit of
23 the Xerox 9200.

24 This is in addition to the cost of the consumer-
25 ables, which are independently purchased by the user. This

1 would include the paper for which the user characteristically
2 cally would pay a quarter of a cent, and the toner or dry
3 ink which is characteristically a tenth of a cent.

4 The equipment in use now, of course, varies
5 from low speed table top equipment, through a number
6 of consoles, through to very large equipment in a speed range
7 from, perhaps, ten copies per minute in small machines,
8 through to the 120 copies per minute at the top end of the
9 presently available equipment.

10 Capability of the equipment: In addition to
11 the obvious aspect that it is supposed to make a copy
12 of reasonable fidelity to the information on the input,
13 there are variations in terms of line-copy solid-area
14 half-tone reproduction. There are color copiers --
15 special-purpose color Xerographic copiers. Varying
16 aspects of input and output automation are now provided
17 on copiers and duplicators, including semi-automatic
18 document handlers; screen feeders; recirculating document
19 handlers on the input and, also, track carrier drivers to
20 drive computer forms across the platen for the reduction,
21 or copying, of computer-print output; capabilities in
22 some machines for over-sized originals and, in some
23 machines, for oversized copies and, again, in some machines
24 for the reduction from oversize to a reduced format.

25 In addition, on the output side, machines are

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1 available with sorters; with stackers; with stitchers;
2 and with staplers.

3 It would be worth mentioning, in passing,
4 related special equipment that does use electrophotographic
5 technologies, or Xerographic technology:

6 Computer printers -- provided in the Xerox 1200; the
7 IBM 3800 and the Cannon machine;

8 Microfiche printers, such as the Xerox 970;

9 And microfilm printers, in addition.

10 The equipment characteristically has meters on
11 for its usage, in particular the rental or leased machines
12 -- as I have indicated -- are generally rented on the
13 basis of a minimum monthly billing and, then, a dependence
14 upon the copy count.

15 Since some of the machines have special functions,
16 and since, in addition, the cost of machine operation for
17 longer runs is less than for single copies, many machines have
18 two meters rather than a single meter and keep track, as it
19 were, of the two modes of copying.

20 In the case of purchased equipment, some of the
21 purchased equipment continues to have meters on,
22 particularly those which are under a service contract,
23 or those in which the service is related to volume --
24 more or less such as an automobile has service either on
25 the basis of time, or on the basis of mileage. In a

1 similar way, many of the aspects of keeping a piece of
2 copying equipment, or duplicating equipment, in full
3 service would relate to doing scheduled maintenance dependent
4 upon the volume that had passed through the machine.

5 MR. NIMMER: May I interrupt?

6 DR. MC IRVINE: Yes.

7 MR. NIMMER: How are those meters read? What is
8 the reporting like?

9 DR. MC IRVINE: The meter recording, in the case of
10 Xerox, is done by the customer and submitted on postcards.
11 It is a system which -- I was not with Xerox or Haloid,
12 actually, at the time that this started, but I simply have
13 to believe that it was done on the basis that no better way
14 could be thought of at the time and, in fact, no better
15 way has been installed since.

16 MR. NIMMER: Reliance is put on the good faith
17 of the customer?

18 DR. MC IRVINE: Reliance is put on the good faith
19 of the customer. There is, of course, a follow-up system --

20
21 -- so that if the cards do not come for some
22 months, somebody is going to check up on this.

23 In addition, in the event that a "tech. rep."
24 has called by to service the machine, he will have the
25 information, if it is overdue -- if we have passed the

1 due date for receiving the meter reading. -- he will take
2 a meter reading while he is there. But the prime reliance
3 for the meter reading is upon the customer.

4 We have a project currently under way which
5 I would like to say a few words about, which involves
6 the Xerox University Microfilms as the prime element,
7 who has contracted with Electro-Optical Systems, which
8 is another Xerox subsidiary -- has contracted with Electro-
9 Optical Systems for the integration of a test system
10 for copyright royalty accounting system for microfiche
11 blow-back and microfiche-to-microfiche replication.

12 This system will depend upon having machine
13 readable encoding on the fiche, and I have here, for
14 example, a sample fiche, and you will notice in the upper
15 right-hand corner of this is -- I guess it is an I.S.S.N.
16 -- International Standard Serial Number -- for the serial
17 in question on that fiche.

18 This is the bar code. It is a subset of the
19 universal product code that we see in our grocery stores
20 all the time, now.

21 There is, as I understand it, a subset also
22 known as the International Standard Book Number for books,
23 which approximately 85% of the U.S. books now include, or
24 now have assigned; and, in the case of serials, the most
25 recent data I have is that while U.S. periodicals, to the

1 degree of about 80% have I.S.S.N. assignments, the actual
2 printing and use of the bar code is considerably less
3 than that 80%.

4 Okay.

5 For a system which includes microfiche originals--
6 and, particularly, those titles for which Xerox University
7 Microfilms either owns the copyright or is the agent for
8 copyright royalty collections--it is intended to test
9 a system for the automatic collection of the transaction
10 data within a pair of Detroit area libraries: The Wayne
11 State University Library and the Detroit Public Library
12 have been involved in the planning of this with
13 University Microfilms.

14 This system will include an optical wand for
15 the ISBN or the ISSN reading, similar to what one sees
16 in some libraries now in terms of book transactions
17 and which you will see -- as I said, -- in grocery stores.
18 It will include a keyboard display unit and a processor
19 for handling the information, and a cassette recorder --
20 a digital magnetic recorder -- for the recording of the
21 transaction data for transferral to University Micro-
22 film, for processing of the information.

23 Then the working elements of the system--in
24 terms of the actual replication--are a fiche-to-fiche
25 duplicator and a Xerox microfiche printer -- the Xerox 970.

1 Now, conceptually, there is no reason why such
2 a system should not be extended to include hard copy-to-
3 hard copy copying but, for this test -- since it is involved
4 with a copyrighted data base that Xerox University Micro-
5 films has access to, or is the agent for, -- we are
6 restricting this to microfiche originals in this library
7 environment.

8 The system should be in some time during the
9 first quarter of 1977 or at least the first of the system
10 should be in, in the first quarter. We will, of course,
11 have the benefit, later this year, of experience gained
12 from that.

13 MR. NIMMER: How will that reporting work?

14 DR. MC IRVINE: Okay.

15 The reporting clearly, again, relies upon a law-abiding
16 user-community who shows good will, and who, in fact,
17 identifies that that fiche is going to have the manual
18 act of being scanned to enter and log the data before
19 the microfiche duplicator begins its job.

20 The output on to the Cassette will be simply
21 a record of the transactions that have taken place.
22 The further computer system that will back this up will
23 be implemented within University Microfilms, and I
24 presume -- although I have not talked to the system
25 architects -- I presume that they are able to use a good

1 deal of the software which is already in place within
2 University Microfilms for handling the copyright royalty
3 recording system for the in-house activities. So it will
4 be, essentially, an added offset transaction recording, and
5 then the transaction will be put into the system utilizing
6 further system development, but in a confined and rather
7 well defined context; both well defined in terms of the body
8 of initial material and, also, well defined in terms of the
9 number of sights which are involved.

10 MR. CARY: Excuse me.

11 DR. MC IRVINE: Yes, sir.

12 MR. CARY: You mentioned that this would take
13 place in the regular law-abiding community that you speak
14 of. But what about the real world?

15 What sort of a system would you suggest there--
16 as opposed to this form of reporting?

17 DR. MC IRVINE: I think -- I am a newcomer to
18 the deliberations of the Commission--but the one thing which
19 I noted in several comments and questions earlier today,
20 frankly, is the proclivity, really, to question what is
21 possible in a system without understanding the limitations
22 of the problem that is being solved. In my past -- in
23 one of my reincarnations in the past -- I dealt at one
24 time with computer-based automation systems in a manufacturing
25 environment. We were constantly fighting the tendency of the

1 users to say, "As long as you have a computer there, can
2 you do * * * " -- and then asking for an added function.

3 Now, the answer -- the first order answer always is
4 "Yes." You can. It is, generally, physically capable.

5 John VonNeumann some years ago -- one of
6 the pioneers of computers -- in giving a public lecture
7 was pestered by a lady, afterwards, who said, "Surely,
8 Professor Von Neumann, you are not saying that a machine
9 can do all of these actions which humans can do? There
10 are things which humans can do that machines cannot!"

11 Finally Von Neumann said, "Madam, if you will
12 define for me exactly what it is that you do not believe
13 a machine can do, I will design a system to do it."

14 And this is really -- very seriously -- the hazard
15 of discussing a system capability. Unless you have a
16 clear idea of the limits and bounds of what the system will be
17 asked to do, it is extremely difficult to get even a
18 first order sense of what the cost will be and, therefore,
19 the cost effectiveness of the system.

20 Consequently, with that preamble, I would see
21 that a system of the sort that University Microfilms will
22 be testing with these Detroit libraries will start
23 to give some basis of understanding of how a practical
24 system works in a limited environment. I would think that
25 the research that King Research is doing will give some

1 idea of the scope of the overall issue, in terms of
2 library usage.

3 The thing that I would caution against is to suggest
4 that solutions which are appropriate for a high volume
5 structured application environment -- such as libraries and
6 educational institutions -- be considered to be feasible
7 for a broader realm of application.

8 Generally speaking, in the 81 billion copies,
9 a great majority of those are going on within environments
10 where very, very little copyrighted material gets access
11 to the machine. I think that there is a hopeful
12 aspect, in terms of finding a practical solution, and that
13 is that the areas where the major problem occurs are
14 also high volume areas, so a specialized system -- perhaps
15 conceptually similar to the test system that we are
16 describing here-- a specialized system perhaps has cost
17 benefit ratios that are appropriate for those heavy volume
18 environments, but there is no way that one could envision this
19 much added equipment and, particularly, it would be difficult
20 to envision the system job, back of collecting and processing
21 of the data for very low volumes of processing on a more
22 general application of this.

23 MR. CARY: Then I take it you subscribe to
24 Von Neumann's statement?

25 DR. MC IRVINE: Oh, absolutely!

1 I have seen any number of systems we never worked
2 because of a lack of definition, initially, of what the
3 exact bounds would be of what the system was to achieve.
4 It is better to describe the system--even if it is incomplete
5 but which solves a majority of the problem--and solve that one
6 completely; and then address the question of whether
7 it can be extended--rather than to try to define an absolutely
8 general purpose system which would encompass all possible
9 future extensions.

10 PROFESSOR MILLER: I take it that, in that
11 81 billion figure, there was no estimate as to what portion
12 was copyrighted material?

13 DR. MC IRVINE: No, sir.

14 PROFESSOR MILLER: Was there any subdivision in
15 terms of operating environment by broad category: Business?
16 Government? Education?

17 DR. MC IRVINE: No. Not in those figures.

18 PROFESSOR MILLER: So we still don't know the
19 size of our elephant?

20 DR. MC IRVINE: Not in the figures that I have
21 available to me. It is possible that the Quantum Science
22 Corporation may have an estimate in terms of user segments.
23 As I said, I am not generally, in my professional
24 capacity, in contact with the market research community.
25 I am not familiar with how readily available that would be.

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1 PROFESSOR MILLER: You would not know of any other
2 source that might have figures like that?

3 DR. MC IRVINE: There are several consulting
4 organizations--Quantum Science being one; Data Quest would
5 be another -- who do estimate the industry. They, for
6 instance, estimate, in fact, the placements of each
7 manufacturer's machines. They make estimates regarding
8 a great deal of the way in which the market is divided.

9 I would think these would be the best sources.

10 PROFESSOR MILLER: Does your company keep such
11 statistics?

12 DR. MC IRVINE: We keep statistics clearly for
13 our own machines and we have, obviously, attempted to
14 estimate what the competitive situation is. But, in fact,
15 I would say that our use, in fact, of the outside consultants
16 is our best route to the industry-wide data.

17 MR. NIMMER: Statistics on what, specifically?

18 I am not definitely following you.

19 PROFESSOR MILLER: Either on machine placement, or on
20 copyrighted versus uncopyrighted photocopying.

21 DR. MC IRVINE: On copyrighted versus non-copyrighted,
22 it simply does not exist.

23 MR. NIMMER: On that, I wonder: What do we mean
24 by "uncopyrighted". If we mean "published without notice"
25 and, therefore, in the public domain, or that 56 years--or

1 75 years-have elapsed from the original publication. That clearly
2 is not copyrighted. But I would guess that that is, relatively,
3 very insignificant.

4 (Simultaneous discussion)

5 MR. NIMMER: That is not non-copyrighted.

6 What we really mean there is: There is no one there
7 who wants to assert a copyright--wants to collect a royalty.
8 It is protected by copyright -- either common law or
9 statutory.

10 PROFESSOR MILLER: If I hear the testimony
11 correctly, in terms of developing accounting systems, one
12 might have a very different approach toward the cost
13 effectiveness of instituting a lot of whistles and bells
14 on office copiers, 98% of whose productivity is my writing
15 you dirty little limericks, on slow afternoons, and photocopying
16 them for the edification of your colleagues.

17 I think we are hopelessly ignorant, at the moment,
18 about the dimensions of the photocopying problem.

19 MR. WEDGEWORTH: That is an important point,
20 because figures like the figures that you have given us, this
21 morning, have just precipitated a lot of mischief.

22 There was an article published in Science Magazine
23 several years ago which projected the number of millions
24 of copies that were being produced on copying machines,
25 as an argument posed towards the damages that are likely

1 to have been made, or the number of potential infringements
2 of copyright that may have occurred.

3 I, too, would like some more precise information
4 about those figures, because that not only relates to notes
5 but it relates to government publications which, in my
6 career, accounts for a significant percentage --

7 MR. NIMMER: That is public domain.

8 MR. WEDGEWORTH -- of the types of items that are
9 copied on machines. But I would like to go to another
10 question, if we may, related to what you have just described
11 here.

12 DR. MC IRVINE: Yes?

13 MR. WEDGEWORTH: I would like for you, if you could,
14 to give us a succinct description of what the objectives
15 of this study, or experiment that you are conducting with
16 Wayne State (University) and the Detroit Public Library, are--
17 and what you anticipate in terms of the results?

18 DR. MC IRVINE: Well, in the limited domain
19 of microform originals, University Microfilms holds the copyright,
20 or is agent for copyright royalty collections for reprinting
21 a great many serials and, towards the question of providing
22 the dissemination of material from those microform originals--
23 not only through fulfilling the orders within the Ann Arbor
24 facility--but fulfilling orders from a variety of other
25 locations for which University Microfilms is copyright

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1 collection agent--the desire is to establish a systematic
2 approach that will enable the orderly growth of that as a
3 commercial endeavor.

4 This is, obviously, an initial test and, during
5 the test period, there will be consideration and evaluation as
6 to whether or not this is something which is easily extendable.

7 What I indicate is that this has a simpler
8 character than the broader question, because of the concentra-
9 tion of the copyright permission and the royalty collection
10 in a single location at University Microfilms for the
11 material that will be handled in the test.

12 If you would extend this to originals other than
13 those that are from University Microfilms, then you add an
14 extra dimension in terms of the fan-out of the system on
15 the other side--in terms both of permission and of royalty
16 returns.

17 MR. WEDGEWORTH: Surely you have more precise
18 objectives than that in this particular study!

19 Are there not particular questions that you ask
20 with regard to this experiment--that you are actually
21 testing in a real situation?

22 DR. MC IRVINE: Well, respectfully, I am not
23 with the University Microfilms subsidiary. I have not been
24 a party to the details of the conceptual development that
25 lead to this study. I have been associated, in my role with

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1 corporate Xerox in such a way that I have seen the technical
2 results of this--in terms of the system that was developed
3 in the Electro-Optical System--but the exact business aspects
4 of it, I simply am not close to.

5 I am sure there is a study plan for the test
6 and, presumably, a plan as to what might ensue beyond that.

7 MR. LEVINE: Dr. McIrvine, when I first heard
8 of this new system of making copies for microfiche and
9 recording the transactions, my understanding was that the
10 machine would not work unless the bar coding were recorded.

11 Is that correct, or has there been a change in
12 that? It sounds as though it is voluntary.

13 DR. MC IRVINE: I believe that that is true.

14 This is built into the logic of the system.

15 Not clear to me is: What is to prevent me from
16 unplugging the 970 from the system and running it as a
17 stand-alone Xerox 970?

18 Really, what I am saying is that, in an environment
19 that has good will, this is a system which eases the task
20 of recording the transactions. In a system which wants
21 to defeat it, there are going to be relatively easy routes
22 to do so; which really brings me to the other question which
23 I am sure is on your mind:

24 Is there any way of making automatic recognition
25 of copyrightable material?

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1 That is a subject which I had thought of some years
2 ago, and so I thought about it again, and looked at whatever
3 information I could find.. The answer really keeps coming
4 up that, if you are looking for ease of identification, you
5 can work out ways in which there is relatively easy identi-
6 fication by going through such things as bar code marks;
7 although, here, you have some serious questions as to whether
8 you mark every page of a hard copy document, or just how
9 one handles document sizes; and partial copying; and aspects
10 of this sort.

11 If you are looking, however, for something which
12 will automatically identify and record any system that has
13 been tried in terms of security, it generally fails in terms
14 of what I call the "second generation" problem. That is,
15 you can think of a system that is closed on itself to the
16 extent that the generation of the copy that comes out of
17 it, in fact, requires recording of information appropriately.
18 But the copy that comes out, in fact, can get outside of the
19 boundaries of that system and then be subjected to further
20 copying.

21 In the early days when there was only the
22 Xerox 914 for a few years, people, for instance, tried
23 Golden Rod paper -- bright yellow paper. It turned out that
24 the photo receptor in that particular copier was highly
25 responsive to bright yellow and, therefore, when you copied

1 black ink on this yellow background, it came out all black
2 and was not legible.

3 However, there are, in fact, copiers out, right
4 now, at the moment, which do not copy yellow at all, or have
5 a very, very low spectral response in the yellow and, there-
6 fore, this is ^{exactly} the wrong color-if you are trying to defeat
7 that particular product.

8 Audio auxiliary means, such as magnetic encoding,
9 bar codes, and so on, can similarly be thwarted if there
10 is malice in the mind of the person who approaches it.

11 There is more control inside an electronic system but--
12 as anyone who has followed the growth of time-shared computer
13 systems can testify again with ingenuity any MIT graduate
14 student can defeat any security system which is installed
15 in terms of recording. The classic thing is the battle
16 between Computer Science graduate students who have a
17 limited budget for the use of computers, and the people
18 who design the system, to record how much computer time they
19 have used.

20 There almost always are counter measures, and
21 it has to be treated as a problem of balance. That is: To
22 what extent will we add to the expense of the system in
23 order to prevent a degree of leakage?

24 MR. NIMMER: On that, sir, I understand that
25 technology is capable of countering technology. We have the

1 anti-ballistic missile, and the anti-anti-ballistic missile,
2 and so on; and that a telephone -- a pay telephone -- is
3 capable of being worked so that you don't put the money in.

4 But that, I think, may not be our real problem.
5 That is: The question is not, "is there technology possible
6 to answer this technology", but, "Is it a system that can
7 easily be countered and violated by the ordinary person
8 who is not an MIT graduate, and who does not have available
9 to him machinery supplied to him by an MIT graduate?"

10 And, on that latter part, that presumably could
11 be made unlawful -- that is, the distribution of the
12 machinery that will counter it.

13 So, putting it in that context, are there devices
14 available that have a reasonable kind of security involved?

15 DR. MC IRVINE: I believe, in terms of relatively
16 complex high volume systems, that one has cost effective
17 technology, either here or, shortly, available.

18 In terms of low volume usage in copy duplicators..
19 I don't see any present technology that will allow it.
20 In particular, I think that the logistics of the system back
21 of it, is the thing which defeats -- one could imagine
22 a simple counter. Instead of recording the entire data from
23 a bar code, simply a black dot, and it records that either
24 there was a black dot, or there was not, and it keeps the
25 counter on this basis.

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1 But that kind of technology, while it would be
2 implementable, it does not allow of the complexity of the
3 system in back of it that achieves full identification either
4 of the input document, nor really, equity, in terms of some
5 of the other issues that I mentioned.

6 MR. NIMMER: You mean, specifically, it might
7 identify whether a work is in copyright, but it would not
8 identify which work it is?

9 DR. MC IRVINE: Yes, that is correct.

10 I think that the logistics of the system--back of
11 collecting full information on transactions--in my judgement,
12 would be self defeating.

13 MR. NIMMER: But that still could be useful, depend-
14 on how the system works.

15 DR. MC IRVINE: Yes.

16 MR. NIMMER: It wouldn't tell who gets paid on
17 the receiving end; but it would tell how much has to be paid.

18 DR. MC IRVINE: Yes! I think a system of that
19 degree of complexity could, conceivably, do that.

20 MR. NIMMER: On that kind of a "dot" device,
21 could you beat the "second generation" problem that you speak of?

22 DR. MC IRVINE: You could actually beat the "first
23 generation" problem by taking a piece of paper and pasting it
24 over the spot where the code is.

25

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1 MR. NIMMER: Is there any kind of a censoring
2 device that is technologically and economically feasible,
3 that could go through the entire work -- whatever the page
4 is -- and determine whether there is a "dot", regardless
5 of whether it is covered or not?

6 DR. MC IRVINE: There are more complex technologies.
7 I would think here, for instance, of magnetic technologies
8 that could be utilized in that form but, again, the
9 "second generation" problem then defeats you because, once
10 having achieved a system outside of the sphere of control
11 that says, "This system will go on to a machine which
12 records the magnetics", you then have both the existing
13 copiers -- which are not so equipped -- and, also, low volume
14 future copiers which would be uneconomical to equip with
15 censoring devices.

16 So that, external to the system, there would be
17 additional ways of making added copies once you had paid
18 for the first.

19 MR. NIMMER: On that, there is no way that you
20 see of building it in so that the copy necessarily
21 copies the triggering mechanism?

22 DR. MC IRVINE: It could, as I said within the
23 system, copy the triggering mechanism but unless you
24 are going to constrain the person to use that copy within,
25 as it were, the walls of a fortress wherein there were no

1 copiers that did not contain the mechanism.

2 MR. NIMMER: Suppose the law said that all copiers
3 must have that on them?

4 DR. MC IRVINE: One can always legislate a great
5 deal of cost into this.

6 MR. NIMMER: We cannot accomplish legislation, but
7 we have to think of the possibility of legislation.

8 DR. MC IRVINE: Yes. I think the issue of cost
9 effectiveness is not one that I can really speak to without
10 knowing more about the external dimensions of the system.
11 That is why I think the King Research activity will be
12 extremely helpful to the Commission in terms of defining
13 what the scale of the problem is and, as Mr. Wedgeworth
14 suggests, additional data in terms of the subdivision of
15 the industry probably would be of value in further
16 understanding this.

17 Let me speak, briefly, about system extensions, because
18 I have talked about reprographics in this Information/
19 Science environment in which, as I say, the copiers don't,
20 really, copy. They are making a transformed representation
21 of an original which is presented on a platen.

22 At present, we already have systems -- in some cases,
23 partially manual; and in some cases fully automatic systems --
24 which start to incorporate reprographics technology with
25 other of the evolving technologies -- generally electronic

1 technologies.

2 We have, clearly, computers with computer printing
3 and, in some cases, with either the paper output of a
4 computer printer, or the microform output of a computer
5 output microfilm unit then being used for the further
6 dissemination of information.

7 We have word processing systems which -- either
8 in conjunction with copiers or, in at least one current
9 --currently-announced product--
10 product,/ word-processing in conjunction with a printer --
11 provides additional copies, often using the same reprographics
12 technology that is appropriate to the copiers/duplicators
13 industry.

14 We have facsimile communication; some facsimile
15 units using electrophotographic technology; others using
16 variations on this which are not appropriate for Optical-
17 platen copying, but are appropriate to electrical response.

18 We have storing-forward-facsimile systems which
19 are, in essence, mail systems instituted electronically.

20 We have microform storage and retrieval and
21 microprinting systems--often associated with a computer-based
22 indexing and control system.

23 Systems of all of the types that I have just named
24 are now cost effective for certain special purpose
25 business systems; and that is a further significant comment,
I think, because many aspects of these would not have been

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1 cost effective ten years ago. It is only because of the rapid
2 evolution of Electronic and Opto-electronic component
3 technology that these, now, are used in other than as a
4 curiosity, or other than as a very, very, special system.
5 There is technology now in use in business which, ten or
6 fifteen years ago, would only have been affordable in
7 terms of a military command and control system, or, perhaps,
8 a weather forecasting system, or other highly special-purpose
9 applications.

10 As the cost basis --and, therefore, the pricing of
11 systems of this complexity -- comes down, the attractive-
12 ness starts to infiltrate applications, such as libraries,
13 which traditionally had not seen the cost effectiveness of
14 these more automated systems. Therefore, it is my belief
15 that you are seeing in the reprographics field, in a fairly
16 simple system -- and that is an original on a platen to a
17 representation which is close to a copy of the original --
18 you are seeing the leading edge of what will be a
19 succession of problems that will infiltrate libraries
20 and the educational institutions and other locations having
21 access to copyrighted material, in that these
22 technologies will gradually become accessible in a cost-
23 effective way for a wider and wider range of applications.

24 As this happens, you will not be seeing simply
25 the copying of material in the sense that it is a representa-

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1 tion of the original, but the utilization of the informa-
2 tion content in transformed ways which are considerably
3 different than simply darkening light pencil to a dark
4 black mark; but, instead, has to do with the internal
5 editing--the composition changes, in fact--of the informa-
6 tion content, in a substantial way.

7 Therefore, the considerations of the Commission,
8 I think, while they address an immediate question of the
9 utilization of reprographics technology, also can learn
10 from our experience with reprographics technology, some
11 of the aspects of usage that may later infiltrate these
12 broader information technology applications.

13 So, in summary, I would say the following:

14 First off, you are dealing with a field --
15 that is, information technology -- which is almost without
16 fundamental limits in terms of the growth potential.

17 Others will testify, or have already testified to the
18 Commission, on computer graphics; on automation; on video
19 disk recording; and on other reprographic technologies.
20 Generally speaking, they will have been addressing en-
21 coded information.

22 I did want to stress that copiers deal with a trans-
23 formed version of the information content, but one which
24 has very few preconceptions about whether any of the data
25 is encoded or, even, is in character format and, therefore,

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1 has some different characteristics.

2 Marking technology, itself, is reasonably mature
3 and therefore, the cost and price basis that I was mention-
4 ing earlier is likely not to be radically changed in terms
5 of the basic marking in the future. But electronics, and
6 optoelectronic components are still in a rapid curve of
7 improvement in their cost performance; and system technology
8 involving the use of reprographics is still fluid.

9 I have mentioned the size of the environment --
10 the 81 billion in copying -- in duplicating; 35 million
11 in micro-publishing; 170 billion frames -- impressions --
12 of computer printing; 300 billion in offset spirit stencil.

13 I mentioned that special systems do appear, now,
14 conceivable for a copyright royalty accounting system in
15 a constrained and constructive environment.

16 However, the clearinghouse logistics appear to me
17 -- as one with some experience at least in the systems
18 area -- to be exceedingly complex, if the system goes beyond
19 the high volume, more or less centralized reproduction
20 centers.

21 MR. NIMMER: Dr. McIrvine, thank you very much.
22 You have been very helpful.

23 I want to be sure I am clear on something you have
24 said:

25 Under the existing system, where the machines are

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1 leased -- and most machines are leased, is that correct?

2 DR. MC IRVINE: Currently, most machines are
3 leased.

4 Actually, I can give a little bit of interpreta-
5 tion -- just to round it out.

6 The 62 billion and the 19 billion split which was
7 mentioned by Quantum Science: if you look into that, I am
8 fairly certain that you will find that the 19 billion
9 impressions -- while that is one quarter of the impressions --
10 represents more than one quarter of the machines, because the
11 machines that are sold tend to be the low volume machines.

12 The logistics of placement and the capital costs
13 are such that the higher volume machines have tended to
14 ,always, be leased.

15 MR. NIMMER: Of those that are leased, the rental
16 lease payment is geared according to use?

17 DR. MC IRVINE: That is correct.

18 MR. NIMMER: Of copies made?

19 DR. MC IRVINE: That is correct. There are
20 variations on this. In some, there is an absolute maximum
21 payment; there is virtually always a monthly minimum.

22 MR. NIMMER: And, to some extent, that is also
23 true of purchased machines?

24 DR. MC IRVINE: Most purchased machines -- an interest-
25 ing point here -- this is a complex technology, if we are

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1 dealing with Xerographic machines. Consequently, the
2 service aspect of a sold machine is a whole issue in itself
3 and so, even with the sold machines, very often the purchaser
4 will sign on for a service contract--either with the company
5 that sold it to him, or with a third party.

6 MR. NIMMER: Could we be very specific?

7 You say the lessee sends in, to the Xerox Corporation,
8 a number, which indicates the number of copies used during
9 a last given period.

10 Is that correct?

11 DR. MC IRVINE: He sends the most recent meter
12 reading, which is subtracted --

13 MR. NIMMER: He reads off of the meter?

14 DR. MC IRVINE: Yes, sir.

15 MR. NIMMER: Would it be difficult, instead of his
16 looking at a number on the meter and typing that up, to have
17 a paper emerging that has, printed on it, the number, so that
18 it is your number and not his number? Is that difficult?

19 DR. MC IRVINE: From the technological point of
20 view, this is not a difficult extension.

21 MR. NIMMER: From a technical, economic, point
22 of view?

23 DR. MC IRVINE: I think from the technical
24 logistics point of view, it is probably not terribly
25 much better than having him write it down, because you still

1 have to have the customer mail it.

2 MR. NIMMER: Well, if he doesn't mail it, then
3 his service is cut off and the machine is taken back--if he
4 is leasing it. Isn't that true?

5 DR. MC IRVINE: But this exists already in terms
6 of the present system.

7 MR. NIMMER: What I am getting at: Where, now, you
8 have to rely on his sending in the right number -- the correct
9 number -- he has to send in some number or the machine goes
10 back, but you rely on his good faith as to what the number
11 is.

12 Wouldn't that reliance be reduced--at least in
13 some degree--if, instead of that, he tears off the paper
14 at the top of the page -- like an adding machine number --
15 a number that has your print on it. I conceive that that,
16 too, obviously could be altered and doctored, but it is much
17 less likely that it would be.

18 DR. MC IRVINE: No. There is nothing, techni-
19 cally, which keeps this from happening. It would require,
20 for instance, some way of counting the days so that
21 the machine knew that the time had elapsed and it was time
22 to push out one of these. Otherwise, it is clear that, if
23 it required action --

24 MR. NIMMER (Interposing) Could it not just
25 keep coming out, like the old fashioned adding machine, with

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1 the roll of paper -- or maybe that is too complicated.

2 DR. MC IRVINE: Technically, there is no real
3 reason to. I suspect that if, in fact, we had had
4 terrible difficulties with the customers in terms of
5 mailing, that such a scheme probably would have received more
6 attention.

7 MR. NIMMER: Can you suggest any other alternative
8 and, maybe, more sensible reporting devices, other than
9 simply the current system?

10 DR. MC IRVINE: For the higher volume machines,
11 one can actually consider some reasonably sophisticated ones.
12 You can lease a telephone line, for instance, and poll
13 a machine on its status, in the ultimate. Now, that is a
14 very expensive operation.

15 You can go to an interim one, and there have, in fact,
16 been tests by utility companies in terms of their meter
17 reading problem, which is an extensive one, as the labor
18 costs go up.

19 There have been tests by utility companies in terms of a
20 system which requires changes, I believe, in the telephone
21 tariff. This is a system where the telephone line to a unit
22 on the meter is periodically polled and information comes back
23 across that line.

24 I do recall reading of field tests of this sort
25 of a system. I have not seen anything in the last three or

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1 four years on this--so I suspect that something was difficult,
2 in the logistics, for the utility company. But, technically,
3 it is entirely possible to go all the way through a scheme
4 of that sort, or a number of intermediate schemes where,
5 as you suggest, paper would automatically be produced.

6 JUDGE FULD: Did I not understand you to say
7 the lessor sends around an inspector, at times, to check on
8 the numbers?

9 DR. MC IRVINE: Generally speaking, the technical
10 representative -- the service force -- will be visiting
11 the machine at periodic intervals but, in the case, again,
12 of low volume machines, this may be a very long time between
13 visits. A machine which is operating at low volume, and
14 operating well, may go many, many, months before it requires
15 service.

16 MR. PERLE: I want to make absolutely sure that I
17 understood you correctly.

18 Have you said that we may as well forget the idea
19 of having any automated system -- automatic system -- of
20 recording and keeping track of materials on reprographic
21 machines--as to whether they are copyrighted or not copy-
22 righted--and, if copyrighted, who the copyright proprietor is?

23 DR. MC IRVINE: Excuse me. I missed one point.
24 Did you say "completely" automatic?
25

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1 MR. PERLE: A practical system of recordkeeping
2 which would lead to a clearinghouse; or lead to keeping
3 track of that which is actually copied.

4 Before you answer, let me tell you what bothers
5 me about this, and this is probably not your department.

6 I am sure it is not.

7 What you are really telling us, as I hear you, is
8 that we may as well forget about keeping track of what is
9 copyrighted and what is not copyrighted, and what is copied
10 in your Haloid process machines -- your reprographic machines
11 -- and we better start looking at what the Germans are doing--
12 which is a direct tax on each machine, or some other alternatives-
13 -rather than keeping track of what is actually copied.

14 I think that is what you said.

15 DR. MC IRVINE: I believe I am distinguishing
16 between two very different machine or system implementations.
17 That is, in fact, maybe more than two--because I am dealing
18 with two environments and two machine installations.

19 One is a copier with, perhaps, 3,000 or 5,000
20 copies a month being made on it which, characteristically
21 is in a business environment -- unstructured environment --
22 with casual operator usage and, in fact--if I took the extreme
23 case--it would be a sold machine with no meter on it at all.

24 The other extreme would be a high volume machine
25 with, perhaps, a quarter of a million impressions per month,

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1 in an environment where there is a dedicated operator, and
2 where the flow of information -- the flow of documents --
3 through this, is under a good deal of control.

4 Now, what I am saying is that, in the highly
5 concentrated, high volume environment, both the technology
6 could be amortized in a cost effective way and, also, the
7 environment is one that could be a library environment in
8 which the copyright material exposure happens to be large.

9 In the other, in the low volume case -- and in
10 that environment -- I do not see any system which would
11 allow automatic recording; and it goes beyond the question
12 of the recording of the transaction. It also goes to
13 the question of the logistics of handling.

14 It is almost as though we were to re-examine the
15 Postal System -- which may be a horrible example -- but
16 to re-examine the Postal System from the point of view of
17 charging, according to where the origin and the destination
18 was, of every letter. That would be very, very difficult.

19 If, on the other hand, you were to say that we
20 are going to give bulk mailing permits and charge people
21 different fees on this, then it is conceivable that you can
22 start to alter it for that bulk environment, and still be
23 cost effective.

24 MR. PERLE: Well, somebody, somewhere, at Xerox,
25 must have gone into this whole question of how Xerox, and
who
other companies like Xerox /manufacture these magic machines,

1 can stay in business if the product that they put out violates
2 the law. And you are telling me that your machines will not be
3 able, in a cost effective way, to monitor that which they are
4 doing and, therefore, you are telling me -- I think -- that
5 this Commission has to think of some other way of compensating
6 copyright owners whose works are being ripped off.

7 I think that is terribly, terribly, tough for Xerox--
8 if that is what you are telling me.

9 DR. MC IRVINE: Well, I believe, Mr. Perle,
10 I am making a distinction between an environment and a
11 technology,

12 MR. PERLE: I cannot make that distinction! All
13 I know is that this Commission is charged with looking into
14 the study, and collecting information, really, on: what do
15 we do about copyrighted works?

16 How do we compensate copyright proprietors when
17 their work is duplicated?

18 It is certain that we cannot simply say that
19 anything that goes into a duplicating machine is being
20 cleared of any charge without a copyright. Therefore,
21 I made the assumption -- and I think everybody else has --
22 that, in some point in time, every machine that duplicates
23 copyrighted materials under any circumstances where the
24 proprietor is entitled to compensation, leads to a situation
25 where the copyright proprietor is entitled to compensation.

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1 If you are telling me -- as you have -- that the
2 machine, itself, can take care of this only in very, very
3 esoteric circumstances and controlled circumstances, I think
4 you are telling me we have to look at a different solution.
5 And I would think that your company ought to think very
6 carefully before it gives any answer to my question "that
7 we ought to look elsewhere," because I think some of the other
8 answers--other than keeping track of a per-transaction or
9 a transaction based compensation--is going to result in some
10 terrible economic consequences in the whole industry.

11 I would love to have Xerox come back to me with
12 some sort of considered answer to that.

13 I think what I am really saying is that I think
14 the industry has to do some thinking about this, itself!
15 I don't think we, as laymen, ought to sit back and say, "This is
16 the way it ought to be."

17 I think we need some real guidance on it. I think
18 it is every bit as important as developing new technology,
19 and reproduction, itself!

20 JUDGE FULD: Mr. Wedgeworth?

21 MR. WEDGEWORTH: One question that I think may
22 bear a little on Mr. Perle's point is that it is conceivable
23 that a group of low volume -- as you characterized it --
24 installations -- say three to four thousand transactions --
25 that are highly concentrated on a few publications, could,

1 indeed, be ... a more economically viable situation for trans-
2 action-based royalty payments than your high volume installa-
3 tion, where the transactions -- the frequency of transactions --
4 might be scattered over 150,000 different copyright proprietors
5 in a given time period.

6 Is that not conceivable?

7 DR. MC IRVINE: I really don't have any statistics
8 on library usage and, in terms of the business environment,
9 generally speaking, the high volume machines are used for
10 multiple copies of fewer originals than the low volume
11 machines, whereas the low volume machines -- again, in the
12 business environment with which I am more familiar -- are
13 characteristically used for one or two copies of a
14 great many originals during the month. So that, actually,
15 the ratio would go somewhat in the other direction. The ratio
16 of number of copies to number of originals presented would
17 be low for the low volume machine, and would be high for
18 the high volume machine.

19 MR. WEDGEWORTH: The reason I raised the question
20 is that it, again, points up the difficulties of making
21 those kinds of assumptions in the absence of any information
22 about the distribution of the activity in terms of the
23 types and character of the works being copied.

24 MS. WILCOX: I wonder, in the equipment that you
25 suggested, is its purpose primarily for making copies of

1 copyrighted materials only in a controlled situation?

2 DR. MC IRVINE: The test system would be confined--
3 in terms of the originals--to the microfiche inputs from
4 University Microfilms.

5 MS. WILCOX: My question is: Do you see this machine
6 as being used for other kinds of photocopying?

7 In other words, if the total volume, or the number
8 of machines, would be -- as I understand you are
9 suggesting -- in this controlled environment, there would be
10 "X" number of libraries in the Country, or in the World. That
11 would mean, maybe, that you would have ^avery limited volume
12 that you could produce and, therefore, the cost would be
13 quite high.

14 DR. MC IRVINE: I believe this is partially
15 related to what I, perhaps, did not stress sufficiently
16 earlier; and that is a very great system difficulty in terms
17 of the permission. and, in terms of the test system, we have
18 this advantage: University Microfilms has permission for
19 the limited-source material.

20 MS. WILCOX: Well, I guess that leads to the next
21 question:

22 Do you have any figures on the volume of materials
23 that either you own the copyright through the Commission,
24 or you are the Agent for?

25 In other words, how big of a test would you be
making on this?

DR. MC IRVINE:

111

1 Steve Rice from University Microfilms is here.
2 Perhaps Dr. Rice could give an answer.

3 MR. RICE: I am not sure that I understand
4 what you mean. We have 13,000 periodicals--of which some
5 7,000, more or less, are received currently and, of those
6 which are currently received, I don't know how many of those
7 are copyrighted. But the great preponderance would be.

8 MR. WEDGEWORTH: Sir, could you come from behind
9 the column and identify yourself for the record, please?

10 DR. MC IRVINE: This is Dr. Stevens Rice of
11 University Microfilms, a subsidiary of the Xerox Corporation.

12 MR. RICE : Thank you. For the record, however,
13 I don't hold a doctorate.

14 I don't know exactly how many publisher
15 rights we hold for the reproduction of separate articles.
16 There are a considerable number.

17 MS. WILCOX: I am trying to get some kind of a
18 feel for what kind of a test this would be, so that, if you
19 had, say, maybe, access -- if this is a controlled en-
20 vironment and you had access, maybe, to 5% of the copyrighted
21 materials that would be actually copied in libraries --
22 in other words, it seems to me there is a lot of controlled
23 environment here that we are talking about.

24 MR. RICE: Very much so; and there are a great
25 number of variables, one of which is the data base, or the

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1 number of titles, and the character of the titles which you have
2 in your test situation. We are not at all sure that we are
3 choosing the right data base, although we are doing it in
4 cooperation with a couple of libraries in our geographical
5 area.

6 The data base which we use will be extremely small
7 and we are going to have to do our best to draw conclusions
8 from that -- which is a dangerous thing to do because of the
9 number of variables. We don't know whether the data base
10 is right; And we don't know whether we have chosen the right
11 test sites, and so forth, and so on.

12 What we are trying to do, primarily, is to see
13 whether the device which we have is acceptable to librarians;
14 is acceptable to the general public; is acceptable to
15 publishers; whether it works; and so forth.

16 We are not sure that we are doing this the right
17 way; and we don't know what the right way is; and if anybody
18 can help us, we will be pleased to receive those suggestions.

19 PROFESSOR MILLER: I would just like to reinforce
20 something said by Gabe.

21 I always get depressed over the fact that life
22 seems to be one giant crap shoot in the dark!

23
24 When I joined this Commission -- from some
25 rather primitive notions of copyright that I had encountered in

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1 some former life -- I had assumed that at least three of
2 the most rational or likely models for orchestrating the
3 payment scheme in the photocopying area were:

4 (1) A per-transaction count done on some automated
5 basis through the photocopying machinery itself, and
6 by parity of reasoning in the computer field.

7 (2) An ASCAP/BMI type of random-sample-
8 auditing with a marginally arbitrary scale of payments,
9 depending on what that random sampling showed of a variety
10 of types of uses of photocopying machinery and, by parity of
11 reasoning, automated data processing equipment.

12 (3) Finally, the juke box model of an absolute
13 flat, arbitrary, per month, per year, per machine charge--
14 without going through the mechanics of counting anything.

15 If there was one thing I was sure of a year ago,
16 it was that I would learn something that would enlighten me
17 as to making some judgement between and among these three--
18 leaving to one side the other half of the universe -- the
19 clearinghouse problem, the transaction costs of which God knows
20 what the truth is!

21 I must say I don't know a thing more, today, than I
22 knew then, and I am very depressed about that!

23 For an industry making 81 billion impressions a
24 year, somebody has to know more than they appear to know about
25 who does what with which machines--to whose copyright. And

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1 I don't see how this Commission can make any enlightened
2 judgement on this entire subject until we get some better
3 information or, at least, a more formal and fuller options
4 paper on each of these models, with the pros and the cons. If we
5 have to do it abstractly, without the benefit of facts, at
6 least let's see what the trade-offs are.

7 End of monologue!

8 JUDGE FULD: I don't think there is that much basis
9 for pessimism. I think Dr. McIrvine has given us the best
10 he has.

11 PROFESSOR MILLER: Oh, I have no doubt about that!

12 But I am an eternal optimist about the bases for
13 pessimism.

14 DR. MC IRVINE: I might support that by analogy,
15 Professor Miller, in pointing out that when I joined Xerox
16 I thought that we should be able to say, for example,
17 how many half-tone originals, how many line copies, how much
18 text goes onto the platens of our machines, and we have no
19 idea; so it is only the question of how much -- copyrighted
20 material is only one of a great number of variables about
21 what goes onto the platen of a machine--on which we simply
22 do not have data.

23 It could be gathered; but it is a major effort of
24 monitoring in order to gather significant data.

25 PROFESSOR MILLER: Please don't get me wrong! This

1 is not something that I am laying at your feet as being
2 unique to your business. I have been in Law teaching for 15
3 years. And if you think I know what makes a better lawyer,
4 today, than I did 15 years ago, you are wrong!

6 MR. NIMMER: Professor Miller, the first option
7 raises, I think, two separate issues; one of a factual,
8 statistical, question of how much copied material is protected
9 by copyright now and, beyond that, is the sort of material
10 that people would want to assert rights in.

11 Separable from that, though--in order to take that
12 first alternative model -- assuming that we know the amount
13 and assuming that we conclude that, on the basis of that
14 amount, it is economically worthwhile to go forward on some
15 kind of a first model basis; namely, keeping track of exactly
16 what is being used and who is using it, and what materials
17 can be used -- there remains the technological question of
18 how you effectively police and keep track of that question.

19 Now, the Microfilms experiment answers that to a
20 degree--but only to a degree.

21 If we are talking about hard copies, and if we are
22 talking about public machines not supervised, is there any
23 way of technologically and economically feasibly keeping
24 track of exactly what is the work that is being reproduced?

25 Now, you suggested, "No"; and I would like to join

1 with my colleagues in specifically focussing on and giving
2 emphasis to this particular aspect. We hope that you people,
3 maybe, can give some further thought to that issue and
4 maybe come back with some further thoughts on it.

5 JUDGE FULD: I think that is a good place to stop.

6 Our thanks to you, Dr. McIrvine.

7 Our final speaker for today is Ben H. Weil, Senior
8 Staff Advisor of the Exxon Research and Engineering Company's
9 Analytical and Information Division in New Jersey, where he
previously headed the Information Center.

10 Mr. Weil has been with EXXON research since 1937. He
11 is Chairman of the American Chemical Society's Copyright Committee,
12 and a member of the Information Industry Association's Proprietary
13 Rights Committee; and the author of five books and over 200 papers.

14 He will discuss with us some of the difficulties
15 which for-profit organizations will face after the enactment
16 of the new Copyright Law, providing copies of journal
17 articles to their researchers.

18 Welcome, Mr. Weil, to our meeting.

19 STATEMENT OF MR. BEN H. WEIL, EXXON CORPORATION

20 - on -

21 THE OPERATIONS AND REQUIREMENTS FOR ACCESS TO
22 SCIENTIFIC AND TECHNICAL MATERIALS OF A LARGE
INDUSTRIAL RESEARCH LIBRARY

23 MR. WEIL: Thank you, Mr. Chairman and Commissioners.

24 First of all, may I assume that you have a group of exhibits?

25 JUDGE FULD: Yes.

1 MR. WEIL: Because I will refer to them at a
2 certain point.

3 I sincerely appreciate this opportunity to talk to
4 CONTU about the document-access requirements of scientists
5 and engineers at a major industrial-research center; and
6 about the related services, from their information center.

7 You have heard some of my qualifications and
8 involvements. I have been involved with this type of
9 work in information center service, as Management, for some
10 at this point
11 36 years /and, in connection with this and being a chemical
12 engineer, myself, I have used information, as well as helped
13 others to gain access to it.

14 In speaking about the document-access requirements
15 and services at the Linden Exxon Research Center, -- I
16 am referring specifically to the center at Linden. We have
17 other installations and other libraries throughout Exxon
18 Corporation, world-wide. We are, indeed, the largest
19 research center, and have the largest information center
20 and the largest library, by far.

21 Just the same, I wanted to be clear that what I am
22 describing is specific to this research center; and it
23 differs in various ways from the similar needs and services,
24 even, of other company locations.

25 While I know that similar services exist at other
major industrial-research centers, I am also aware that

1 there are others at which they are not provided.

2 Similarly, while many smaller research centers do not
3 have such services--again, there are others that do -- that
4 are served by small special libraries or others charged with
5 providing them. I hope that the King Research Study -- which
6 you are co-sponsoring -- can be more quantitative.

7 I am simply indicating that what I am going to be
8 talking about is specific to the Exxon Research Center in
9 Linden. It has analogies; but I am in no way pretending that
10 it is typical.

11 Now, at the Exxon Research Center, several hundred
12 scientists -- specifically, or more specifically -- chemists,
13 chemical engineers, physicists, and a few other types of
14 scientists and engineers, are engaged in scientific and
15 technical research and development activities. Through their
16 efforts, new or improved petroleum and chemical products are
17 developed, manufacturing processes are improved, and important
18 pioneering research -- long-range research -- is conducted.

19 Considerable attention is also focused on environmental
20 research and on synthetic fuels. Indeed, the Company's
21 Government Research Laboratories are engaged in numerous
22 investigations under federal sponsorship or funding in these
23 and other areas of Company expertise.

24 Now, the great majority of our scientists and
25 engineers hold doctorate degrees -- and by "great majority"

1 I mean great majority, so we are, indeed, a scientific
2 orgaization, even though many do not contemplate that industry
3 has such truly scientific types of activities. The research
4 studies in which these scientists and engineers are engaged
5 are often of an advanced scientific nature; require knowledge
6 and application of the latest scientific and engineering
7 knowledge and information.

8 Therefore, despite the extent and availability of
9 our own proprietary information -- we have been in business
10 since 1919 -- our scientists and engineers depend heavily
11 on the published literature. Indeed, 44% of participating
12 scientists listed it as their most important source of
13 information--in a study that we conducted a few years ago.

14 This study also showed that journals and business/
15 trade magazines provided 50% of the total beneficial impacts
16 from their literature readings, or an average of 463 beneficial
17 impacts per man-year, with these periodicals followed, in
18 importance -- but not very closely -- by books, abstract
19 bulletins, Government reports, patents, sales brochures, and
20 computerized information.

21 This study was encouraging to us because it
22 indicated that the Exxon Research Center's professional staff
23 is deriving very real benefits from the considerable informa-
24 tion resources made available to them. As regards current
25 journals, for example; in addition to their personal subscrip-

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1 descriptions, our professionals can regularly read journals
2 routed to them -- at their request -- by the information-
3 center's library.

4 And the first of the exhibits is a typical routing
5 slip produced by a computer-based system, so that as the
6 journal issues come in, they are sent to the people who
7 have asked to see them, on a regular basis.

8 In their behalf, their research divisions also
9 subscribe directly to some hundreds of journals. In
10 addition, our information center assists these scientists
11 in keeping abreast of current information reported in
12 thousands of other journals, by regularly providing
13 computer-based SDI -- "selective dissemination of
14 information" -- Mr. Farley mentioned that this morning --
15 from several major information bases, such as "Chemical
16 Abstracts Condensates" and the Engineering Index's COMPENDEX
17 -- periodic computer runs against carefully developed
18 computerized "profiles" of their projects.

19 The second of the exhibits is the top sheet
20 from an individual scientist -- or, rather, a project profile.
21 These are, really, cards which can be ripped apart. This is
22 a photocopy of just certain batches. These can be ripped
23 apart by the scientist, filed, sent in with requests for
24 copies, or whatever the individual wishes to do with it.
25 In this particular case, since Chemical Abstracts comes out

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1 weekly, these scientists would get these -- whatever it is,
2 they would get-a great many times per year.

3 We also have profiles on a good many other bases.
4 I just took this one. You will note, by the way, that
5 although some of the SDI profiles will give an abstract,
6 these are purely bibliographic. They will give the title
7 of the article; source; author; and a little information
8 as to the scientist, as to how the particular document
9 might have been indexed by other terms than Chemical
10 Abstracts Condensates weekly index; but it is a biblio-
11 graphic type of service.

12 Another source of current information that we
13 provide is the dozen or so targeted bulletins of literature
14 and patent abstracts prepared by the American Petroleum
15 Institute -- a central abstracting and indexing service.
16 Our information center distributes individual copies in
17 meaningful combinations to most of the members of our pro-
18 fessional staff--a practice initiated, in 1920, for the similar
19 abstract bulletins that we prepared, ourselves, until the late
20 1960's--at which point the API's program became very similar
21 and, in fact, we were participating in it, and were a major
22 subscriber thereto.

23 The next exhibit is what we call a combined
24 edition of certain bulletins which used to represent a title
25 which they had before, but, every week, API puts out

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1 something called "Petroleum Refining and Petrochemicals
2 Literature"-- informative abstracts. They also put out
3 a bulletin called "Air and Water Conservation". I believe that
4 is what it is called.

5 Once a month, also, in this package, they put out
6 a monthly on Petroleum Substitutes, and another one on
7 Transportation and Storage. Some of you will have one, and
8 some of you will have another. I was not able to get
9 extra copies of the same issues.

10 These bulletins are also available separately; and --
11 to those people who just want a given one, such as Petroleum
12 Substitutes-- this is what I meant when I said they distribute
13 it to people in packages that are meaningful to them.

14 The eight American Petroleum Institute Planning and Patent
15 Abstract Bulletins put out a dozen such bulletins.

16 MR. WEDGEWORTH: What is the arrangement with
17 API for you to redistribute these copies?

18 MR. WEIL: The basic subscription: the API
19 has a system in which the subscription is proportional to
20 refining capacity, so that the larger companies pay more
21 than the smaller companies. So once you have paid that
22 basic subscription, you may buy any number of copies that you
23 wish at a run-off price.

24 Consequently, another term I use for these is
25 "technical newspapers".

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1 MR. WEDGEWORTH: You subscribe to a certain number
2 of copies of each of these?

3 MR. WEIL: Depending on what our people tell us they
4 want.

5 MR. WEDGEWORTH: Yes.

6 MR. WEIL: Some hundred. Several hundred.

7 MR. WEDGEWORTH: You produced this combined
8 edition. cover yourself?

9 MR. WEIL: No. They do it for us.

10 We are not the only ones they offer this service
11 to. In fact, the combined edition is a standard thing. The
12 only thing they do for us is to put this information on
13 the back--which tells our people where it is coming from,
14 and what to do about it.

15 Otherwise, with the exception of the words down
16 on the bottom, this is a standard product.

17
18 Statistics for these document-alerting services
19 could be confusing, but a few can be informative. The several
20 hundred scientists getting library-routed journals regularly
21 receive issues for an average of 11 titles-- this is 1977
22 data -- requiring 961 library subscriptions to keep routing
23 lists to an effectively short length. This does not mean 961
24 titles. It means 961 subscriptions, because when a list gets
25 to a certain length -- I believe 10 is the maximum -- we buy

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1 another subscription, because the information is not valuable,
2 or not of maximum value, unless it is reasonably current. So
3 we buy additional subscriptions to keep current.

4 For in-library reference and access purposes, the
5 Library also receives an additional 302 journal subscriptions
6 -- and that figure is pretty close. There are 300 titles;
7 302 subscriptions.

8
9 Over 100 SDI "project" profiles are currently
10 serviced, providing bibliographic updates to the majority of
11 the Exxon Research Center's staff.

12 I will define that by saying that a project
13 ^{several} profile often serves/people, rather than being what each
14 individual man working on a project will do, because profiles
15 are reasonably expensive -- \$100 to 200 or more per year --
16 although that gets down to just \$2.00 or \$3.00 a week if you
17 start counting it that way.

18 Also, we are large enough that there are a
19 number of people who are interested in a given project
20 and we often find them coming in with the same request for
21 a profile that we are already running, so that there are
22 always a number of people who share a given SDI profile. We
23 often buy extra copies for that purpose.

24 And, as I mentioned, we add several hundred
25 subscriptions -- local copies -- to this; and, also, we make

1 these available to our Exxon affiliates, world-wide. Some of
2 our functions are, indeed, world-wide. Most of our library
3 functions are local.

4 Individual scientists and engineers, information
5 chemists in our information center, and the staff of an
6 information-analysis group -- and I am using trade terms
7 here -- in another division, also search our library's
8 extensive collection of access services, reference works,
9 books, primary journals and patents, to locate documents
10 pertinent to new projects--or to problems arising in on-
11 going work.

12 Outside sources are also consulted, and, in recent
13 years, rapidly increasing use is being made of on-line
14 interactive computer searching of major information bases in
15 scientific, engineering, and business fields. I know that
16 you have visited the on-line services of the New York Times--
17 which is one of the services that is available to us.

18 One of the exhibits -- I will skip one, as it
19 happens -- is two or three pages from the off-line print
20 of one of the on-line searches that we have run. Sometimes --
21 (although we now have high speed equipment; we rarely resort
22 to off-line printing)-- if the number of references get too
23 high, you can often ask the base to send it to you by mail
24 and stop printing it off on your lower speed equipment.

25 As you will again notice -- and this, again, is not

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1 true for all of the services -- some of the bases -- again,
2 this happens to be Chemical Abstracts -- do not contain
3 abstracts and, indeed, the information that is available
4 to us is purely bibliographic.

5 I will mention this, by the way: With the exception
6 of this bulletin, most of the information that we are
7 able to give our scientists is bibliographic in nature--
8 and even the abstracts in this bulletin wind up, in all
9 cases, with bibliographic references, because only so much
10 information can be obtained in an abstract which is, by its
11 very nature, kept short.

12 While extensive direct use is still made of our
13 many journal subscriptions, and of our library's major
14 collections, our scientists and engineers have also found it
15 increasingly effective to obtain individual copies of many
16 of the documents -- chiefly journal articles -- pertinent to
17 their current work. They still obtain some articles as
18 reprints from their authors, and they occasionally make a
19 photocopy of an article in the journals that cross their desks,
20 but, for some years, they have requested most of their
21 needed document copies from the information center's library.

22 This library has then provided, or obtained, the
23 copies requested; in general, by ordering or borrowing copies of
24 books and Government reports; but usually relying on photo-
25 copying for single copies of journal articles.

In referring, again, to books, for example, I have

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1 included a page from the current list which we circulate
2 as to books currently received by the library. You will note
3 that the reference here is: "If somebody wants to see the
4 book, we will send it".

5 Most of the needed photocopies can still be made from
6 the library's extensive subscriptions and holdings. And,
7 indeed, we -- as do many special libraries -- have all made
8 it a point, and have prided ourselves on our ability to
9 subscribe to and have available most of the documents which
10 and,
11 our staff needs /to the best of our ability, to identify those
12 documents and sources.

13 Those that cannot be so provided from our collection
14 are being obtained, in various ways, from the major resource
15 libraries. Publishers have been contacted directly
16 for permissions whenever there is a real need for more than
17 a single copy of an article.

18 The importance of our library photocopying service
19 used to be frequently debated, but it passed an acid test in 1968
20 when it was nearly discontinued as an economy measure. Journal
21 routing had recently been discontinued for the same reason, but
22 we were able, quickly, to restore it, because of a ground swell
23 of scientists' indignation focused through their research-
24 division directors, and accompanied by the required money!

25 About one thousand cancelled journal subscriptions

1 then had to be reordered. To avoid the possibility of a similar
2 storm of protests and discontinuity as regards library photo-
3 copying, we were able to arrange to have the plan to discontinue
4 this service announced to the research-division directors with
5 two weeks allowed for objections. These being unanimous, the
6 service was continued. It has since become increasingly
7 important with the advent of computerized SDI and on-line
8 interactive searching. These two computerized-type services
9 uncover pertinent documents in thousands of different
10 journals, far more, and far more varied, than any collection
11 that the library could conceivably assemble.

12 Again, I refer you to this example of a
13 computerized manual. You will note that the journals in it
14 range rather considerably. I have very carefully avoided
15 having them all from Russian periodicals -- which is all
16 too easy to do, when you look at these. These -- at least
17 in most cases -- are not Russian periodicals.

18 Because of the importance that our professionals
19 place on their needs for journal-article photocopies,
20 Company management and that of our information center have
21 long been alert to developments regarding copyright. We have
22 long scrupulously adhered to the American Library Association's
23 photocopying guidelines in making or requesting photocopies
24 -- by which I mean: such things as single copies only.

25 We have cooperated, completely, with the few journal

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1 publishers who already require payments for photocopying
2 rights, usually as part of their microfilm program, but
3 we have also pointed out that we could never afford to
4 extend their substantial surcharges to any major portion of
5 our journal subscriptions. And I might add by commentary
6 here, that we only subscribe to the microfilms of those
7 journals which are important to us from among those pub-
8 lished by the American Chemical Society, or Pergamon.
9 Those are the two major licensees of microfilms accompanied
10 by photocopying rights.

11
12 We have participated actively on committees and
13 through publications in the deliberations preceding passage
14 of the new copyright law--with a clearly expressed willingness
15 to pay reasonable fees in a reasonable manner if, as, and
16 when required by law, for value admittedly received. And we
17 have also repeatedly urged Congress, journal publishers,
18 and others -- including yourselves -- to insure our ability
19 to make or obtain photocopies in a manner that is also fair
20 to the copyright owners, whose products are so vital to our
21 research. I have listed some of our related publications
22 at the end of this statement.

23 Industrial information centers and special
24 libraries such as ours, will certainly operate within the
25 new copyright law. I may add, by the way, that I am a

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1 chemical engineer, but I often forget that and consider myself
2 a librarian, and I would like to voice a word that I don't
3 really believe that immensely complicated controls that are
4 foolproof and everything else are vitally needed in this
5 area. I have faith in the honesty of librarians!

6 But I must voice, again, my concern that legal means
7 must also be created to permit centers requiring broad-based
8 photocopying programs --

9 MR. NIMMER: May I interject--just on that comment?

10 MR. WEIL: Yes.

11 MR. NIMMER: Because I don't want any incorrect
12 implications.

13 MR. WEIL: I am not implying any implications.

14 MR. NIMMER: I have no question of the good faith
15 of librarians. It is that the problem arises as to
16 machines that are not under the supervision of librarians, That,
17 one wonders about.

18 MR. WEIL: All right. I will respond to that.

19 I really believe that those machines -- this is
20 a personal belief -- are out of the possibility of control,
21 or payment, or likelihood, except in the extreme event
22 that it is indeed possible completely to make everything
23 foolproof--so that every machine would, indeed, deliver
24 royalties.

25 I believe that we are going to have to settle--

1 somewhere-for a more realistic system of collection
2 points -- major libraries, minor libraries, whatever the
3 case is -- where people ask for copies, or where people go
4 for copies--rather than machines that stand around and people
5 may step up to them.

6 I realize, in some universities, and so on,
7 that those machines are heavily used, so that perhaps a
8 mechanized method -- I made the same suggestion when
9 I testified to the Congress and Senate in 1973 -- that it
10 seemed logical to me that a machine device should be
11 possible. But at least Congress, at that time, did not seem
12 to want to collect from -- as it was put -- the "school boy
13 out in Indiana". So, at any rate, I really believe that
14 the practicalities of any solution to this will have to come--
15 in some manner-from collection-center types of services,
16 that, in other words, are big enough -- they don't have to be
17 very big to be big enough, in this case -- where clearinghouse
18 mechanisms can be used.

19 I did not mean to imply anything, in any way! I
20 simply wanted to say from those centers from which I believe
21 those collections will come; I believe that the people who
22 are there are accustomed to serving professionally, and
23 would serve professionally.

24 I must voice, again, my concern that legal means must
25 also be created to permit centers requiring broad-based

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1 photocopying programs to continue to serve their "customers"
2 optimally. I personally believe in the practicality of
3 reasonable transaction per-copy charges for copies made, with
4 simple periodic reporting and payments to a collection/
5 distribution center. It is also my personal belief that a
6 general program for increased subscription charges that
7 would include copying rights would force many budget-limited
8 libraries to cut back more sharply on their subscriptions;
9 specific copying charges would be much easier to pass along
10 to photocopy users than any flat charges.

11 Whatever the method, I strongly urge a centralized
12 program, clearly enunciated before the middle of this year;
13 otherwise, I am certain that hundreds of libraries,
14 including ours, will be forced to approach hundreds of
15 publishers individually in an effort to arrive at satis-
16 factory photocopying arrangements -- an event which I believe
17 neither we nor the publishers desire.

18 In addition to the ability to continue local
19 photocopying programs, individual scientists, engineers, and/or
20 the libraries handling their requirements will also need to
21 continue to be able to obtain, from outside sources, copies of
22 journal articles that are not logically available locally--
23 and that exceed the limits defined in or for the new copyright
24 law. Whatever the sources, we would expect them to apply the
25 surcharges that might be required by the evolving clearinghouse

1 system to make these copies or photocopies legal ones, or to
2 be operating under direct licenses from the publishers.

3 Again, I sincerely appreciate this opportunity to
4 describe the information practices and needs of Exxon Research
5 Center scientists and engineers; and some of the ways in which
6 these are currently being satisfied. Industry is still vital
7 to our economy and is a legitimate part of our way of life.
8 Unnecessary barriers to the effective conduct of industrial
9 research will almost certainly be harmful to the nation,
10 especially since companies such as ours conduct the majority
11 of all research, including the majority of that which is
12 federally funded. We look to the publishers, to you, and to
13 all concerned, for actions that will constructively permit us
14 to continue to use photocopying technology.

15 Thank you.

16 JUDGE FULD: Are there any questions?

17 There being none, I thank you, Mr. Weil, very much.

18 MR. LEVINE: I have just one question.

19 I have heard it said, Mr. Weil, that this system
20 really cannot wait until January 1, 1978, to become operational--
21 because, by that time, so many private arrangements will have
22 been made that it will not be practical to retreat back
23 to the clearinghouse system.

24 MR. WEIL: I don't hold that belief--although it
25 is my belief that the sooner a system is in place, the

1 better. To be perfectly frank, I am pessimistic about my
2 ability to acquire satisfactory photocopying licenses from
3 the sources that I need to attract. Also, because -- if
4 nothing else -- of the fact that I am going to have so
5 many counterparts, and the publishers are, individually, going
6 to have to handle so much paperwork, that I don't believe
7 that that system is going to be operational by the end of
8 this year.

9 In other words, if no clearinghouse is in place
10 by about June, I will, indeed, assay it and I may add, so
11 will many of my counterparts. We have been discussing this.

12 But I am not, personally, optimistic that I will
13 achieve what I need.

14 MR. LACY: Do you think, Mr. Weil, under the new
15 Copyright Law, that many industrial information centers,
16 such as yours, will try to qualify under the provisions that
17 they are open to the public, and that they are non-profit?

18 MR. WEIL: Yes. Some will, but only the smaller ones
19 will be able to satisfy their needs in this way. Those that
20 don't have services and, consequently, are only supplying
21 random copies or, indeed, would only be requesting from the
22 resource libraries up to or no more than five photocopies of
23 a given title -- and I know there are many such small
24 organizations. But I know, also, that there are many small
25 ones and a great many more large ones. Remember, our demands

1 are not set by sales. They are set by the people who use us.
2 This would not make it possible -- even if we were an open
3 special library -- and I may add, we are not an open
4 special library, so we are not entitled to use this, in
5 any event.

6 The main reason we are not "open", is: We have
7 two things. Government contracts, which keep our plans
8 closed; and (2) We have proprietary information, logically
9 and conveniently for our users, on the side. I suspect this
10 will be true for others. So that, while there will be a
11 great many who will, indeed, be able to operate under fair
12 use, and under the guidelines that you developed as regard
13 interlibrary loans, these will be the smaller, less active
14 programs whereas the organizations that are more active
15 will not be.

16 MR. FRASE: Is there any indication in the
17 materials that you have supplied as to the volume of photo-
18 copying you do?

19 MR. WEIL: No. What I read was my statement.
20 It is sizeable. I have certain interesting facts about
21 it which, by the way, is that it is not more sizeable now than
22 it was 10 or 15 years ago. It happens that we saw
23 photocopying technology as useful when it became available,
24 and switched to it, early on.

25 I may add that the reason I cannot read some of these

1 statistics as competitive ones is that most of us don't talk
2 about things which will make it possible for our competitors
3 to get a line on the exact scale--or whatever. This
4 is why I have not told you how many scientists we have,
5 and so on. But it is sizeable. It is sizeable, both
6 internally, and in terms of those documents which we must go
7 outside for, although, on a ratio basis, our library sub-
8 scriptions have added up to about 75% of that.

9 JUDGE FULD: Again, our thanks, Mr. Weil.

10 This concludes the Commission's agenda for today.
11 We will meet, again, tomorrow at 9:00 o'clock.

12 The Commission will recess for four or five minutes
13 and then take up some Commission business.

14 (Whereupon, at 3:30 o'clock, p.m., the reporting
15 of the meeting was concluded until Friday, January 14, 1977,
16 commencing at 9:00 o'clock, a.m.)

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NATIONAL COMMISSION ON
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ELEVENTH MEETING

TRANSCRIPT OF PROCEEDINGS

Place: Arlington, Virginia

Date: January 14, 1977

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Eleventh Meeting

Room 910
Crystal Mall Building
Arlington, Virginia

FRIDAY, January 14, 1977

STANLEY H. FULD, CHAIRMAN

MEMBERS OF THE COMMISSION:

(As hereinbefore listed)

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1 JUDGE FULD: I call to order the meeting of
2 January 14th.

3 Our first speaker this morning is Peter F. Urbach,
4 Deputy Director of the National Technical Information Service.
5 He is responsible for the Government's Inventions Program
6 at NTIS, a program which seeks to promote wider private
7 sector use of Government inventions.

8 Before joining that organization, he worked in the
9 Patent Office -- first, as a Patent Examiner; then doing work
10 in Information Retrieval and Systems Analysis.

11 He will talk to us about the NTIS' program for
12 supplying authorized photocopying of journal articles.

13 We look forward, Mr. Urbach, to your remarks.

14 STATEMENT OF PETER F. URBACH,
15 DEPUTY DIRECTOR, NTIS
16 -on-

17 THE NTIS PROGRAM FOR THE SUPPLYING OF
18 AUTHORIZED PHOTOCOPIES OF JOURNAL ARTICLES

19 MR. URBACH: Thank you, Judge Fuld.

20 The National Technical Information Service, an
21 agency of the U.S. Department of Commerce, provides a wide
22 range of information products and services to business and
23 industry on a self-supporting basis. NTIS is the successor
24 organization to the Office of Technical Services and the
25 Clearinghouse for Federal Scientific and Technical Information.

The legislative charter of NTIS is broad. It
directs the Secretary of Commerce "to establish and maintain...

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1 a clearinghouse for the collection and dissemination of
2 scientific, technical and engineering information" using
3 "information from whatever sources, foreign and domestic,
4 that may be available."

5 We also are required by our Statute to charge
6 our users for the products and services we provide so that
7 NTIS will be as self-sustaining as possible.

8 The basic business of NTIS is the sale of government-
9 funded technical reports and related bibliographic products
10 and services. We sell about 4,000,000 report copies each
11 year in paper copy and microfiche form. NTIS activities are
12 not, however, limited to either Government-generated informa-
13 tion or the traditional technical reports.

14 We also handle the announcement and sale of
15 selected reports not funded by the Government, from non-
16 government sources such as MIT and the Electric Power Research
17 Institute, as well as the rigorously evaluated engineering
18 data from the Engineering Sciences Data Unit in London, and from
19 fifty different information analysis centers, such as the
20 Metals and Ceramics Information Center at Battelle, and the
21 Thermophysical and Electronic Properties Information Analysis
22 Center at Purdue.

23 A portion of the sales income on each Information
24 Analysis Center product sold is returned to the IAC as
25 payment for the product furnished to our customers. We thus

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1 serve as a sales agent and accounts broker.

2 In a similar fashion, we provide computerized
3 demographic reports, on a customized basis, from a large
4 computer data base maintained by the Lawrence Berkeley
5 Laboratory, and we handle the accounting and billing for the
6 National Library of Medicine MEDLARS service.

7 There are other activities that NTIS is involved in
8 that are not quite as much related, as these that I have
9 mentioned, to the interest of this Commission. I will only
10 mention briefly that we handle the collection, announcement,
11 and sale of common use software -- Federally generated soft-
12 ware -- together with the General Services Administration,
13 serving as the Federal Software Exchange Center to make
14 Federal software available to the other Government agencies
15 and, through the NTIS mechanism, to the general public.

16 Also, we are involved in the licensing and selecting
17 of Government inventions.

18 NTIS currently has over 150,000 customers; 12,000
19 of whom have NTIS deposit accounts which they draw upon
20 regularly to order our products and services. Our order
21 processing system is highly automated. Over 4,000 individual
22 orders are received daily, primarily by mail but, also, by
23 Telex, Telecopier, telephone, personal visits, and on-line
24 computer ordering. The vast majority of the orders we
25 receive -- some 70% -- are mail orders from established

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1 depositaccount customers. Our deposit account system
2 handles nearly 1,000,000 postings, and \$7,000,000 in sales,
3 annually.

4 From this brief description, you can see that
5 NTIS' current operations parallel, in some respects, some of
6 the functions of a copyright clearinghouse handling access
7 to periodical literature. Where our customers receive
8 products and services directly from other information
9 sources, such as the Battelle Metals and Ceramics Informa-
10 tion Center, or the National Library of Medicine MEDLARS
11 system, we receive transaction information, and then we use
12 that to debit our deposit accounts of our customers for the
13 service that they have received, and we make the payments
14 to the Centers which furnish the products and services to
15 the customers.

16 We have been asked by some of our major customers
17 if we could utilize the existing NTIS mechanism to
18 provide NTIS customers with access to journal article
19 copies. These users are concerned about copyright release
20 on the article copies they receive, the difficulties in
21 dealing with a wide range of fulfillment sources, different
22 order procedures and payment practices, and their inability
23 to get sufficiently timely service routinely to meet their
24 requirements.

25 During the past year, we have been exploring the

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1 possibility of such an NTIS service. We have held dis-
2 cussions with NTIS customers, abstracting and indexing
3 services, professional societies, private journal publishers;
4 and with libraries and private business organizations currently
5 providing public access to journal article copies.

6 We have concluded that NTIS should offer, on
7 an experimental basis, a clearinghouse service to provide
8 NTIS customers with simplified access to journal article
9 copies. NTIS would offer its users:

10 Central access to a network of major journal
11 holdings.

12 Simplified, standardized, rapid ordering.

13 Simple payment and automated accounting.

14 Guaranteed copyright license on all of the
15 material delivered.

16 NTIS does not intend to build an extensive collec-
17 tion of journal holdings duplicating the collections of
18 the many major libraries already available. Instead, we
19 will work with these existing institutions, which we call
20 "fill sources", providing our customers an alternative
21 means of access to these existing resources.

22 We will receive orders for journal article copies
23 from our customers, and determine which of a number of fill
24 sources can best handle the request. We will retransmit the
25

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1 order to the fill source for the actual fulfillment--
2 the photocopying and mailing of the copy to the customer --
3 to the fulfillment source. PTIS will do the accounting,
4 debiting of the customer's deposit account, paying the fill
5 source for its service, and crediting the publisher with
6 a royalty payment for the transaction.

7 We have discussed this concept with a number of
8 major publishers and have developed a simple single royalty
9 payment system which seems acceptable to many: a straight
10 fifty cent royalty payment per article copied--independent
11 of the length of the article. Nearly all of the publishers
12 who have responded to our proposal have agreed to participate
13 in the experiment, although the process of getting approvals
14 from the appropriate editors, trustees, boards, etc., is
15 often time consuming, and many publishers have told us that
16 it will be several months before they are able to give us
17 formal approval.

18 We originally went to 20 Publishers and have
19 agreements from half of them. These include the American
20 Chemical Society, the American Institute of Physics, McGraw-
21 Hill, and Williams and Wilkins.. Recently, we requested
22 copyright license from an additional 100 publishers
23 representing 1,000 to 1,500 of the most widely
24 requested journals.

25 We have been having discussions with a number

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1 of potential fill sources, such as the Linda Hall Library;
2 the British Library Lending Division, the Franklin Institute
3 Library, the Engineering Society's Library; Information
4 Unlimited, the Institute for Scientific Information,
5 and University Microfilms.

6 We have been conducting clearing tests with
7 three of these sources: the Linda Hall Library, the
8 BLLD, and Information Unlimited.

9 Ultimately, we expect, perhaps, a dozen different
10 public and private, for profit and not for profit, institu-
11 tions to serve as fill sources.

12 After we receive agreements from publishers, we
13 will publish a Directory of Journal Titles for which NTIS
14 has copyright license. The directory will be mailed to
15 major NTIS deposit account customers with an explanation
16 of the new service and ordering instructions.

17 Initially, orders will be accepted by Telex,
18 only. Customers will send a message to NTIS with their
19 NTIS deposit account number and the identification of
20 the desired journal. A simple standardized message format
21 will be used.

22 NTIS will receive the orders automatically
23 throughout the day and, at the end of the day, will
24 sort the orders and route them to the fill sources.

25 Routing criteria will include the known availability

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1 of the journal title at the fill source, previous delivery
2 experience from the fill source to the requestor's city,
3 and the price the fill source charges NTIS for its service.
4 The sorted orders will be transmitted by Telex, Tele-
5 copier, or computer communications link to the fill source.
6 We are currently testing all three of these methods of
7 communication with different fill sources.

8 A machine record by-product of the transmission
9 will serve as the input to our accounting system to handle
10 the debiting of the customer's deposit account, the
11 crediting of the publisher's account with the royalty
12 payment, and the necessary management information.

13 At the end of the month, the customer will receive
14 his regular NTIS deposit account statement which, in
15 addition to the technical reports and other services the
16 customer normally orders from NTIS, will list each of the
17 journal article copies ordered.

18 In addition, the publisher will receive a listing
19 of the articles that have been ordered from his journals.
20 This statement to the publisher will be similar to the reports
21 we presently produce for the Information Analysis Centers
22 on the services that we provide for them.

23 Failure to fill an order should be rare, since
24 NTIS will only transmit orders to fill sources known to have
25 the requested journal, and sources with a demonstrated high

1 reliability in filling orders. In those instances where
2 fulfillment is not possible, the fill source will transmit
3 this information to NTIS immediately, for rerouting to another
4 fill source. In the event that fulfillment is not possible
5 within the expected time frame, the NTIS customer will be
6 notified immediately by Telex.

7 Based on the tests that we have been conducting
8 with the three fill sources during the past three months,
9 we believe that we will normally be able to provide delivery
10 of the requested articles within six days of the customer's
11 request.

12 The price of the service has not been precisely
13 determined yet. It will, however, be a single price for
14 all article copies, regardless of the article length,
15 to simplify the ordering and accounting, and is likely to be
16 in the \$5 to \$7 range. At the moment, it looks like
17 \$6.00 per article will be the price.

18 The price will permit NTIS to recover the costs
19 of internal handling, communications, equipment costs, the
20 fee charged by the fill source, and the publisher's
21 royalty. Different fill sources will charge NTIS
22 slightly different fees. The NTIS price will be based
23 on a weighted average of the fill source charges.

24 We hope to be ready to begin the service, on a
25 limited basis, in March. Initially, the service will be

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1 tested with major NTIS deposit account customers and
2 Telex order input. As experience is gained, we will
3 include all deposit-account holders, and expand the
4 ordering methods to include Telecopier, telephone, and
5 possibly the commercial bibliographic on-line retrieval
6 services.

7 The service can, of course, be easily expanded to
8 cover additional journal titles as long as publishers are
9 prepared to grant licenses and capable fill sources are
10 available to handle the fulfillment.

11 We believe that this approach will meet an
12 expressed need of the NTIS user community, and that it will
13 serve to effectively utilize existing periodical collections,
14 and the capabilities of existing copy fulfillment sources,
15 while providing a simple means to pay the publisher a
16 fair return for the use of the copyrighted materials.

17 Thank you.

18 JUDGE FULD: Are there any questions?

19 MR. PERLE: What type of copyright license do
20 you get?

21 Do you get it, or does the fill source get it?

22 MR. URBACH: We get it.

23 We have developed a simple one-page agreement
24 which we ask the publisher to sign; or we have an exchange
25 of letters between us and the publisher to constitute
the agreement in which the publisher gives us license to

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1 have copied by the fill sources, journal articles from
2 publications that the publisher specifies. In return for
3 that copying, we agree to pay the publisher 50 cents per
4 journal article copied, and to provide the publisher with
5 information on what has been copied.

6 MR. PERLE: Could we get a copy of that form?

7 MR. URBACH: Yes, sir. I have a copy here.

8 MR. LACY: I was not clear:

9 Does the fill source ship the copy directly to
10 the customer and notify you of the shipment, or do they
11 give it to you, and you, in turn, ship it to the customer?

12 MR. URBACH: The fill source ships the copy
13 directly, and we are not asking for notification of shipment.
14 We will be debiting the customer's deposit account as
15 soon as we transmit the order to the fill source. We will
16 assume that the fill source satisfactorily fills the
17 order and the customer receives the copy--unless we hear
18 to the contrary.

19 MR. LACY: When you notify the publisher --
20 you said you notify them of what is copied -- is that in
21 the form of an article from one of your journals, an
22 article from the specific journal, or this specific article
23 from this specific journal?

24 MR. URBACH: The latter.

25 MR. LACY: It is not only the journal, but the

1 specific article?

2 MR. URBACH: In all probability, the record will
3 consist of the journal coding, the volume issue, and
4 the beginning page number of the article.

5 MR. LACY: From which he can determine --

6 MR. URBACH: From which he can determine
7 the title. It will not include the journal title.

8 MR. LACY: I am mildly surprised that, with a
9 constellation of potential fill sources that will cover,
10 practically, the whole universe -- the Library of Congress
11 and the National Agricultural Library and the Library of
12 Medicine -- you are going to Kansas City, to use Linda Hall
13 and various other places.

14 I am just puzzled -- curious -- as to the non-use of
15 the major source libraries immediately at hand.

16 MR. URBACH: We have not yet exhausted the
17 possible list of fill sources.

18 MR. LACY: But once you just start with those
19 three, then you would not have to go any further except,
20 perhaps, for an occasional, very exotic, publication.

21 MR. URBACH: The way the service is starting --
22 we are starting with the most popular journals, so any
23 number of fill sources could handle the request.

24 What we are looking for, of course, are fill
25 sources that can give very rapid response, and who will

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1 charge reasonably low prices.

2 MR. LACY: We have had testimony from the
3 National Library of Medicine and the National Agricultural
4 Library of their efficient, well developed sources, and
5 you can hardly get them cheaper than from the National
6 Library of Medicine.

7 MR. URBACH: We will be exploring the possibility
8 of working with other sources.

9 MR. LACY: I am curious as to why you did not
10 start with those. That is the obvious source.

11 They are located here ; they are well developed;
12 their copying services are already in being.

13 MR. WEDGEWORTH: Mr. Chairman, I would like to move
14 on to some other questions.

15 There is a whole body of evidence that is not
16 sophisticated. It is just very practical. The simple
17 matter is that the real problems of this kind of system do
18 not boil down to major resources, but the ability to fill
19 an order and have it shipped via the mails, according to
20 some convenient schedule.

21 Our experience shows that getting things from places
22 like Linda Hall frequently can be far more expeditious than
23 getting things from Washington and New York.

24 MR. LACY: It may embarrass you less to give
25 that answer, than have the witness give it.

I will accept it. I wanted to bring that out.

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1 MR. URBACH: Our experience with our tests with
2 Linda Hall have shown an average four-day response from the
3 day we submit the order until the copy is received.

4 MR. WEDGEWORTH: I would like to follow with a
5 couple of questions.

6 Is the customer notified of the fill source for
7 a particular order?

8 MR. URBACH: Do you mean as to which fill source
9 entered the order?

10 MR. WEDGEWORTH: As to which fill source is
11 scheduled to fill the order.

12 MR. URBACH: No.

13 MR. WEDGEWORTH: How is the customer to complain
14 about an unshipped order -- an order that they don't receive?

15 MR. URBACH: The customer comes back to us.
16 We will know which fill source received that order.

17 MR. WEDGEWORTH: So NTIS not only controls the
18 billing and the selection of the fill source but also
19 handles the claims?

20 MR. URBACH: That is correct.

21 MR. PERLE: Do you have a history of your
22 customers subscribing to journals when they have repeated
23 orders for articles from that journal?

24 MR. URBACH: I don't have any information on that.

25 We have not looked at the journal-using habits of

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1 our customers at all, but we speculate that our major
2 deposit account users are major users of journal literature.

3 MR. PERLE: I was wondering whether if I, as a
4 deposit account customer, can get a statement showing ten
5 requests for an article from a journal and a bill of sixty
6 bucks. Would I think of subscribing myself, rather
7 than getting it from NTIS?

8 MR. URBACH: I would think you would, yes.

9 MR. NIMMER: Have any publishers refused to co-
10 operate on the ground of the fifty-cent flat royalty being
11 inadequate?

12 MR. URBACH: Yes. One publisher has refused, to
13 date.

14 MR. NIMMER: Only one?

15 MR. URBACH: Only one to date.

16 MR. LEVINE: On that particular ground?

17 MR. URBACH: I am not sure. The ground was not
18 mentioned. But we had only one refusal.

19 MR. NIMMER: On your contemplated charge in the
20 \$5 to \$7 range, do you have reason to believe that the
21 traffic will bear that?

22 MR. URBACH: Yes.

23 MR. NIMMER: What is the basis of that belief?

24 MR. URBACH: Discussions with the major customers
25 who are the prospective users of the service.

1 JUDGE FULD: Ms. Wilcox?

2 MS. WILCOX: Do you have any breakdown of who your
3 customers are; Whether they are individuals, companies,
4 libraries, academies?

5 MR. URBACH: Yes. 54% of our deposit account
6 customers are business and industry.

7 22 or 23 percent are libraries. Academic,
8 federal, college and university libraries.

9 MS. WILCOX: Do you have a breakdown of that?

10 MR. URBACH: Yes. Academic libraries, 7%.

11 Federal libraries, 2%.

12 College and university libraries, 11%.

13 These are percentage of customers as opposed
14 to percentage of dollar volume.

15 Individuals are 5%.

16 Federal government, 11%.

17 Then there is 4% state, local, and regional
18 government and a sprinkling for trade associations, the media,
19 book dealers, and so on.

20 JUDGE FULD: Any other questions?

21 MR. LEVINE: Yes.

22 In a speech which the Counsel of the Senate
23 Patent, Trade, Copyright Subcommittee gave in November,
24 in New York, he said:

25 Senator McClellan's intent is that CONTU

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1 lend its good offices to the development
2 of the private sector of necessary permissions
3 in compliance mechanisms.

4 Do you foresee problems with Congress in your
5 getting into the licensing business?

6 MR. URBACH: I would not anticipate any.

7 We intend to use, to the extent that we can,
8 existing private sector mechanisms to do the job that
9 they are equipped to do -- the filling of orders -- and
10 this is not a business we are seeking to get into.

11 JUDGE FULD: Thank you very much, sir.

12 Our next witness is Copyright Counsel to the
13 Association of American Publishers; a senior partner with
14 a law firm in New York City, Pascus, Gordon and Hyman:
15 Charles H. Lieb, former Trustee of the Copyright Society
16 of the United States and former Chairman of the American
17 Bar Association, Copyright Division. Currently, he serves
18 as a member of the Board of Advisors of the Bureau of
19 National Affairs, and Patent, Trademark and Copyright
20 Journal. He is co-editor of the Scientific, Technical
21 and Medical Copyright Bulletin.

22 It is a delight, Mr. Lieb, to have you
23 address us.

24 MR. LIEB: Thank you very much.
25

1 STATEMENT OF CHARLES LIEB, ESQ.
2 ASSOCIATION OF AMERICAN PUBLISHERS
3 on
4 VIEWS OF THE AAF ON THE SUPPLYING OF
5 AUTHORIZED PHOTOCOPIES AND THE LICENSING
6 OF PHOTOCOPYING

7 MR. LIEB: I appear in opposition to the
8 NTIS proposal. In the time allotted to me, I should
9 like to express the reasons why the Association of
10 American Publishers opposes the project. In that connection,
11 I should like to say a few words about our position with
12 respect to what we think is a companion request by NTIS for
13 a limited copyright term.

14 It has been suggested -- although the
15 Publishers Association has not, as yet, definitely
16 formulated its views with respect to the supply of journal
17 article information -- that I express some very tentative
18 views, with a request that we be permitted to submit our
19 views in fuller form at your March 31 - April 1 session.
20 And then I would like to conclude with an urgent plea for
21 cooperation from CONTU, and from other sources, in the
22 problems that lie ahead.

23 I would like to amplify -- not correct -- the
24 statement that my friend, Peter, made to you. What he
25 said was the truth. But I would like to place that answer
into context.

You asked him whether he had gotten permission
from most of the publishers to whom the request had been

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1 made.

2 As he said in his statement, his original request was sent
3 to 20 publishers. I don't have the list to whom the request
4 was made. I have reason to believe -- I know -- that it
5 was made to a number of professional societies. I don't
6 know which, and how many, private publishers received such
7 requests. I am a little bit surprised to hear that he says
8 that almost all have approved. I do some occasional
9 advisory work to one of the large professional societies,
10 and it is my understanding that they are still considering
11 their answer.

12 But the other publishers to whom the request was
13 made -- the hundred, as he says in his statement --
14 if the request that was received by John Wiley -- who is
15 a client of mine -- correctly indicates the date that the
16 request to all of the hundred was sent, it is dated
17 January 4th, and this is what? January 14. So I think
18 it is much too early to determine what the response will
19 be from the group of 100 to whom the second request
20 was made.

21 Let me state the reasons for our opposition.

22 We think, in principle, this is a very unwise --
23 on the surface attractive -- but unwise and, basically,
24 destructive proposal.

25 There is a compact -- you won't find it in the

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Needless to say, we are pleased
Senator that/McClellan holds our view -- we don't think that it has
been demonstrated thatthe private/^{sector} is unable to do the job.

We think that there is an opportunity for private industry to meet this demand. We are starting, really, as if from scratch, as of October or September -- October 14, or whenever it was that the Copyright Bill was signed.

Some of you at the table know -- and in any event, I will tell you -- that vigorous efforts are being made

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1 at this time by the Technical, Scientific, and Medical
2 Publishers Division of the Association of American
3 Publishers, in conjunction with the Information Industry
4 Association, to establish at least the beginning -- a
5 Model T Ford kind of method -- of meeting the demand by
6 customers, such as NTIS customers, which are mostly, or
7 in large part, in the private sector, to meet their demand
8 for journal article material; and we would hope that we would
9 not have "Big Brother" crowding in on us and, really,
10 pushing us out of the field before we really had a chance
11 to develop what, in good faith and with great effort, we
12 are attempting to develop.

13 We also think that -- we question whether this is
14 really not an ultra vires effort by the NTIS.

15 I have looked at the enabling legislation. I have
16 also seen correspondence from the Department in which
17 they justify their request.

18 The Act - - Chapter 15 U.S.C. --
19 Section 1151 and succeeding sections which was passed in 1950
20 -- is pretty ambiguous. You can, I agree, read almost
21 anything you want to into that, but if you look at the
22 legislative history -- if you will look at the legislative
23 history as cited in the U.S. Code, Annotated -- you will
24 find that the conclusion -- page 3,690 of the legislative
25 history of the section -- concludes with this statement:

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1 "This service will result in an extremely
2 valuable means of utilizing available technology
3 from Military and other Federal basic research
4 processes having industrial value, resulting
5 from the hundreds of millions of dollars currently
6 being appropriated by Congress for such research."

7 To me, it is quite clear that what the Legislators were
8 saying in their report -- although they did not say it quite
9 as clearly in the Statute -- was that, in adopting the
10 Chapter called Dissemination of Technical, Scientific
11 and Engineering information, they were referring to in-
12 formation generated by the United States Government -- not
13 by grantees; not by private people with Government money
14 under grants, but by the various United States Government
15 Departments.

16 Now, that was in 1950.

17 The National Technical Information Service was
18 established in 1970 and when it was established -- and
19 currently -- each year, in the U.S. Government Organizational
20 Manual, -- and I have with me a page from the 1976 edition
21 -- they have said: "NTIS was established to simplify and
22 improve public access to the Department of Commerce
23 publications, and to data files, and scientific and techni-
24 cal reports produced by Federal Agencies and their contractors.

25 MR. NIMMER: Mr. Lieb, if I may interrupt, is that

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1 not really something for us? I understand you are arguing
2 to the Court, but we are going to recommend what it should
3 be.

4 MR. LIEB: Very well, I think you are right! I
5 think I am spending too much time on that.

6 I wanted to point out, however, that I question
7 the legal capacity of NTIS to render this service.

8 There are other reasons why we oppose this.

9 We can see a vast monopoly growing in the supply
10 of information. There is no company in the private sector
11 that can compete with Government. There are private sector
12 companies. I brought in yesterday--to help the University
13 Microfilm spokesman but he did not use it--a catalogue
14 this high-- the University Microfilm Catalogue of material
15 for which they supplied prints on a commercial basis.

16 As you know, the ISI and a dozen other for-profit
17 institutions are engaged in that business. We are hopeful
18 -- as I will tell you later -- that more competition and better
19 service will be introduced during the course of the coming
20 year.

21 These companies, it seemed to me, will find their
22 operations completely squelched -- stepped on -- if Government
23 intervenes.

24 We also think -- and I add this just as a comment
25 -- that the power to distribute includes, also, the power

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1 not to distribute, and if this becomes -- as it could become --
2 such a large instrument for the supply of information, it
3 also becomes an instrument for the withholding of information!

4 I am leading to a point.

5 Perhaps my principal reason for opposition to this
6 is that, like the iceberg, 90% of it is not visible:
7 90% of the potential danger is not visible.

8 I am not casting aspersions on my friend, Bill
9 Knox, nor on my new friend Peter, nor on the integrity or
10 the candor of the present staff of NTIS. I want to say to
11 you, however, that NTIS does not need permission of any
12 publisher to make copies and supply copies to anybody
13 who requests them.

14 Section 1498(b) of the Judicial Code -- which is a
15 very much overlooked section -- provides, in substance,
16 that any Government agency, or any private contractor
17 with whom a Government agency so contracts, when it violates
18 copyright, shall not be subject to injunction or to restraining
19 order, and shall be required only to pay the reasonable and
20 fair cost of the infringement.

21 NTIS says, today, "We will supply only copies which
22 we are authorized to supply."

23 NTIS -- either with current management, or with
24 later management -- if and when this project gets off the
25 ground, will hear from its customers, "But you are not giving

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1 everything that we need. This is not a universal service.
2 If we can only have X, Y and Z, but not A, B and C, your
3 service will not be adequate."

4 People -- executives -- in Industry and in
5 Government alike, being as they are -- Government being as
6 it is -- everybody hating a vacuum -- it seems to me in-
7 evitable that, not in the long run but in the short run,
8 somebody in Government -- whether in NTIS or in the
9 Department of Commerce, or elsewhere -- will say, "But
10 how silly! Why do you wait? Why must you wait for consents?
11 Why put up with, or tolerate, the fact that consents from some
12 publishers are not forthcoming? Do it. You have the
13 right to do it. Offer to pay fifty cents. If fifty cents
14 is not acceptable, do it anyhow and let the aggrieved
15 copyright holder sue you."

16 Now, let me digress for a minute.

17 There are publishers, and there are publishers.

18 There are publishers who produce journals with a
19 circulation of, perhaps, 50,000, where the subscription
20 price may be \$20, \$30, or \$40.

21 There are publishers who produce scientific
22 journals with a circulation, perhaps, of 500, with,
23 possibly, translations from the Sanskrit. I am being
24 facetious, but it just as well could be from the Chinese,
25 or the Russian. And, conceivably, their subscription

1 might be \$2,000 a year for a high cost, high first-copy
2 cost, limited-circulation journal.

3 It is absurd to offer such a publisher a price
4 of fifty cents! It is equally absurd to say that if NTIS
5 or the Government says, "Well, we will nevertheless proceed
6 and copy, and if you don't like the fifty cents that we
7 are offering you, sue us!"

8 It is absurd to suggest that they will then incur
9 the cost that Williams and Wilkins incurred, which is reputed
10 to be something over \$100,000, to recover the fair value
11 of the infringement of that publisher's journal.

12 You might say, "Well, somebody has to incur a cost.
13 That is the first and last cost and, thereafter, everything
14 will be settled."

15 Not so, because Publisher B, publishing a different
16 journal, says, "I am not satisfied with fifty cents".

17 NTIS then says, "Well, the Court awarded
18 Publisher A blank dollars. We will offer that to you."

19 He says, "No! I need more", or whatever.

20 NTIS, or the Agency, says, "Sue us, because what
21 was determined to be a fair price, for the infringement
22 of Journal A, is not necessarily a fair price for the
23 infringement of Journal B."

24 I suggest to you that no matter how well
25 intentioned -- no matter how innocently suggested at this

1 time, this is the proverbial camel with his nose in the tent --
2 and, if this project goes forward with general approval,
3 it may very well lead to Government supply of journal
4 prints.

5 Now, that is one way to go about it, possibly.

6 This could be a universal system; and maybe that
7 is what you are saying to yourselves. But we would hope that
8 Government would not attempt this, and that you ladies and
9 gentlemen would not make up your minds as to whether, if
10 universality is required, it has to be obtained by compulsory
11 Government license, until you would have a chance to judge
12 and determine the merits of the plans that we are attempting
13 to develop, for profit and not-for-profit publishers together --
14 to meet a known problem.

15 To summarize on this point:

16 We think that we see no need for it.

17 We think, in any event, it is premature.

18 We think it is a destructive first step to Government
19 competition with industry; that it is, potentially, a
20 monopolistic threat and, conceivably, an instrument of
21 censorship;

22 That it was not originally intended by Congress --
23 or even by the Department of Commerce;

24 And that it may very well be subject to legal
25 challenge.

1 In that connection, I think it is relevant to say
2 that the suggestion that the NTIS service be established
3 should be read in context with their proposal, that they
4 are aware of, that they obtain copyright.

5 We -- the AAP -- I am not here to say that we
6 flatly oppose that request. I am here to say that it took
7 three years of debate before both Houses of Congress,
8 lots of testimony, and lots of consideration, before
9 Copyright was granted to the United States Government
10 under the Standard Reference Data Act; that jurisdiction
11 on that request was not taken by the Judiciary Committee;
12 it was not treated as a copyright matter; it was handled by the
13 Commerce Committee and by the Science and Technology
14 Committee in the House. I mention this now because I urge
15 you, in your report -- if you plan to comment on the
16 NTIS request at all -- to suggest that the question be
17 examined carefully and deliberately -- not be treated
18 on horseback, so to speak.

19 Now, that really ends my comments on NTIS, and
20 I would like to spend the balance of my time on how we
21 think journal article material can be supplied.

22 But I would answer questions, now, on NTIS, if there
23 are any.

24 MR. NIMMER: I have a few.

25 First, on this last point that you mentioned about

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1 NTIS' request for Copyright -- which, really, is a collateral
2 matter. I have not understood that. Perhaps you can help
3 me.

4 As I understand it, NTIS is concerned with the
5 ability to sell their materials -- primarily concerned --
6 with respect to overseas, foreign sales. Not domestic sales.

7 Now, that is a factual question. I may be wrong,
8 but that is my impression. I may have gotten that incorrectly.

9 If that is correct, then it seems to me somewhat
10 irrelevant what our law says, on whether or not U.S.
11 Governmental works are in the public domain or not. It
12 really turns on what the foreign copyright law says --
13 that no law has extraterritorial impact.

14 Now, it may be that some foreign laws will not
15 accord copyright protection to our Government works if
16 we don't, ourselves, do it. They may be able to do that
17 under the Universal Copyright Convention. But it is not
18 clear to me that that is the Governmental rule abroad. If
19 so, I would like to know what it is, either from the prior
20 witness or from you, Mr. Lieb.

21 MR. URBACH: That is our understanding.

22 MR. LIEB: As always, you are always very acute.

23 We were discussing this. Mr. Hoffman and I had
24 dinner last night with Irwin Karp, who will testify before
25 you today, and with several people from the Copyright

1 Office, and we were discussing this very point. It is an
2 interesting one.

3 In theory, I think it is correct that the mere
4 fact that the United States Government foregoes copyright
5 does not mean that it is not entitled to copyright on its
6 publications in fellow signatories to the U.C.C.

7 I am not entirely sure, but that is really for the
8 foreign Courts to determine.

9 MR. NIMMER: That is right! That is right. There
10 is a section in the U.C.C. that if a class of work is not
11 protected in one Country, the other Countries don't have
12 to protect that class of work.

13 The query is whether this is a class of work.
14 I think it is.

15 MR. LIEB: That would be an ideal solution, would
16 it not?

17 MR. LACY: Before we leave that, isn't it the
18 case that where the protection of the foreign government
19 depends on U.C.C. and not, say, on some such provision
20 of the French law that is more universal than that,
21 isn't the presence of the Universal Copyright Convention
22 notice a prerequisite to claiming protection under the
23 Treaty, and the question is: Could NTIS include such a
24 notice in publications?

25 MR. LIEB: I don't want to answer that question,

1 at the moment. I understand that it was suggested
2 last night that this is not required for protection abroad,
3 and it was also suggested --

4 MR. LACY: Well, not unless you are claiming that
5 protection under U.C.C.

6 MR. NIMMER: It goes beyond that. If you want
7 to avoid formalities under the domestic/foreign laws,
8 then, by virtue of the U.C.C. you have to Notice; but if the
9 foreign Country does not have the formality, you don't
10 need the Notice--even under U.C.C.

11 MR. LACY: In addition to which, I am told -- although
12 I don't know whether it is a fact -- that some government
13 publications are coming out with a Copyright Notice--but with
14 a disclaimer. I don't know whether that is a fact.

15 MR. NIMMER: To understand your objection, a little
16 bit more, to the NTIS, it may be a multiple kind of
17 objection. But it seems to me that there are different
18 aspects of it.

19 Isn't it a matter, simply, that the flat royalty
20 is not enough?

21 Or is it, alternatively, that there is some money
22 to be made from the process of being a clearinghouse itself,
23 and you don't think the Government should take that over?
24 There should be an opportunity for private industry to make
25 that kind of money.

1 MR. LIEB: Neither. Neither!

2 MR. NIMMER: But, then, if it is neither of those,
3 then you get to the censorship point. That, frankly, I
4 don't find very persuasive -- given the First Amendment,
5 and the Fourteenth Amendment, and so on.

6 MR. LIEB: No. It is none of those.

7 My objection -- what you said touches on it --
8 but my objection philosophically is much deeper.

9 I would like to quote -- maybe it is unfair,
10 because I understand that he is enjoying the sun in Florida
11 -- but I would like to quote Mr. Knox when he testified
12 before the Senate in connection with the Standard Reference
13 Data Act. He said,

14 "I believe that the role of the Federal government
15 is significantly different -- appropriately
16 different -- with respect to the production of
17 reference data, on the one hand, and the marketing
18 of data on the other hand."

19 He said,

20 "I believe in Federal leadership and coordination
21 and support of production, but", he said, "I believe
22 the private sector has the responsibility for
23 marketing."

24 What we are talking about here, specifically --
25 and it is important to focus on it -- is not the scientific

1 production of our Government, or of Government Agencies.
2 We are talking about journals put out by the American
3 Chemical Society; Academic Press; Queen Anne Press; John
4 Wiley. We are talking of private publications financed
5 in the private sector, whether for profit or not for profit.
6 And we are talking of a marketing of their reprints --
7 reprints of their articles.

8 I am suggesting that, to start by saying, "Let us
9 do it. Give us your leave", is not where it is going to
10 end. I am suggesting that where it is bound, ultimately,
11 is that the Government says, or the Governmental Agency
12 with which it contracts says, "We cannot be bothered
13 with these efforts to get requests. It takes too much time.
14 Some don't come in. We will supply under 1498(b)". And
15 at that time, I think, you have shaken the very foundations
16 of private journal publishers.

17 MR. NIMMER: Well, then, Charles, is the essence
18 of your objection, really, a compulsory license idea?

19 MR. LIEB: Yes. Yes. Yes. Yes! I am saying that
20 the essence of my objection -- there are two parts to it:

21 I do not think this is a Government function --
22 certainly not at this time! It is only a Government function
23 if and when it is generally conceded that the private
24 sector cannot meet this problem.
25

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1 MR. NIMMER: The question is: Why shouldn't it be a
2 government function?

3 One answer is because of the imposition of
4 compulsory licensing.

5 MR. LIEB: No. The first answer stands by itself.
6 It should not be a government function because publishing is
7 not a government function. You don't want a single source
8 of publishing.

9 MR. NIMMER: But as long as you are getting paid --
10 assume you are getting paid -- for what you regard -- your
11 individual publishers are getting paid what you regard
12 as a fair royalty in this operation. Assume that to be a
13 fact. But it is being pipelined through NTIS.

14 What is the crucial element that is lacking-as far
15 as you are concerned? It is not the money, by hypothesis,
16 if you are getting the royalty you want, unless there is
17 additional money to be made.

18 MR. LIEB: No. I am not talking about that.

19 MR. NIMMER: Or unless it is censorship, or what.
20 I am not clear.

21 MR. LIEB: I am saying that it is just as logical
22 that NTIS -- when it makes a delivery of Government Science
23 material -- should just as well deliver milk and eggs, at
24 the same time. Merely because Government has the facility
25 of making delivery of Government property does not mean that

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1 it should reach out and deliver private property.

2 JUDGE FULD: What harm is done to you? To the
3 publisher?

4 MR. LIEB: What harm is done to the social fabric?

5 That is the question: Should Government be
6 engaging in private business?

7 The general understanding is -- up to now, the
8 common understanding is -- only if private industry cannot
9 do the job. Now, that is a philosophic objection.

10 MR. NIMMER: Do you regard the Cable Television
11 Provision as Government getting into the private sector
12 because they are supervising the compulsory license
13 arrangement?

14 MR. LIEB: Professor Nimmer, I would say that
15 is "apples and pears." I have no objection to the Cable
16 Television provisions, but I don't think it is analogous
17 to the private publication of journals--for profit, or
18 not-for-profit.

19 MR. LACY: What would be your feeling about the
20 Government operating a system of Cable TV to deliver
21 the productions of commercial TV to the homes outside of
22 the reach of those productions?

23 MR. LIEB: Whether it ought to be Government, or
24 whether it ought to be a company the size of American
25 Telephone, I don't know. That is beyond my ken.

1 MR. LACY: Give me a chance to make a distinction!

2 MR. WEDGEWORTH: I would like to pursue, briefly,
3 with Mr. Lieb -- I am afraid I don't quite understand
4 the real implications of your objection.

5 I do see a problem with the issue with respect
6 to the flat royalty, in the sense that there are some journals
7 that are of a vastly different character.

8 When you base your objection on the fact that the
9 Government should not be in publishing, that really
10 astounds me somewhat, since the Government has always
11 been heavily involved in publishing. When you draw a
12 very fine line between Government Agency publications and
13 certain scientific and technical publications, I think
14 that the line is not quite as clear, because a substantial
15 percentage of the scientific and technical information that
16 is published is funded under Government contract, or grants,
17 or what-have-you.

18 The marketing question is a significant one, and
19 I would like to move into what I thought you originally
20 intended to appear here and talk about, by prompting you
21 with a question.

22 It seems to me that one of the issues involved
23 here is effective marketing of copyrighted works and,
24 if we assume that you have a vast network of various kinds
25 of information agencies, including libraries across the

1 Country that operate relatively effectively in distributing
2 material, it seems that the arrangement that NTIS has
3 proposed does take advantage of that effective network.

4 You pointed out that the Government should only
5 act where private business fails to act. I really would like
6 to hear from you what AAP might propose in this area--
7 recognizing that, at present, it really cannot deliver the
8 goods.

9 MR. LIES: Yes, and if you recognize, also, that I
10 am not expressing fully formulated views. They are, in large
11 part, personal, but they are being worked on now by a joint
12 task force.

13 Let's first define what we are talking about.

14 I was a little bit distressed, yesterday, at the focus
15 of some of the remarks, because it seemed to me that what you
16 were talking about was a universal system -- self contained
17 -- some beautiful gizmo -- which, in the first place,
18 would be able to distinguish public domain from copyrighted
19 material; distinguish between various kinds of copyrighted
20 material; distinguish between fair use of copyrighted
21 material, and use in excess of fair use, and then run the
22 meter on what it was that was to be paid for.

23 I think that what you are attempting is much greater,--
24 if that is what you are looking for at the present time.

25 JUDGE FULD: We are looking for answers!

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1 MR. LIEB: I suggest that the problem that requires
2 immediate attention today, and in the months and in the few
3 years ahead, is a much narrower problem. It could very well
4 be that, later on, you will come to that broad universal
5 problem but, today, if I understand the situation correctly,
6 since the passage of the Copyright Act; since the adoption
7 of your CONTU guidelines with respect to interlibrary lending,
8 I think the pressing, crying need today is concentrated on
9 journal articles in technical, scientific, medical, and
10 academic fields.

11 It is my understanding that the bulk of the
12 photocopying that goes on today; and the bulk of the inter-
13 library lending -- so-called -- that goes on today, is in
14 that area.

15 I think it is fair to say that, with respect to
16 the Interlibrary Loan Program, some order has been brought
17 into the situation by virtue of the passage of the Act, and
18 the adoption of your guidelines. One very big area that is
19 crying for immediate attention -- and, if the problem is
20 not solved is likely to produce chaos -- is the need by
21 what I call "special libraries"--industry-related libraries
22 and other libraries, other special libraries -- the need --
23 their need, at times, for prints and at other times, for a
24 license to make copies on the premises, for which they are
25 willing to make payment. And this is the area -- I said

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1 before -- that we think is the most pressing and the most
2 urgent, and this is the area in which we are working,
3 and hope to come to you with some beginning of a solution.

4 Let me read to you some of the principles that we
5 are working with.

6 We break this down in two parts: first, as to
7 the supply of journal articles as "separates" -- reprints --
8 as distinguished from on-the-premises copying.

9 We agree that the special status of medical,
10 scientific, and technical journals makes it advisable that
11 "separates" be made available at a fair price; and within
12 a reasonable time.

13 We regard this as a relaxation of the Copyright
14 rights that the owner of a copyright in more general
15 material should have.

16 We think that Mr. Hersey, for example, should have
17 the right to say, "I don't want the poem or the article
18 that I wrote to be in circulation any longer," And we don't
19 see any social need, ^{or} pressing need.

20 But somebody else says, "But I must have it;
21 therefore, I must have the right to copy it."

22 As publishers of scientific material, we forego
23 that right. We recognize that there is a need -- a
24 Society need.

25 MR. NIMMER: Why is this limited to scientific?

What about Economics, Law, Sociology?

MR. LIEB: I said "Academic". All right. We have to make a start somewhere, and we are focussing, as a beginning, on --

PROFESSOR MILLER (Interposing) What evidence is there that the bulk of the problem is in the environment you described? That is, the academic or interlibrary situation?

MR. LIEB: Mr. Wedgeworth will correct me if I am wrong, and I don't pretend to be a student of this, nor do I have the reference material with me, but it is my understanding that the Palmour Report, which was written for the American Library Association in 1973, maybe -- you are shaking your head.

MR. WEDGEWORTH: It was written for the Association of Research Libraries.

MR. LIEB: Excuse me.

PROFESSOR MILLER: Yesterday, we had testimony that there are 81 billion impressions a year and the witness could not give us any breakdown whatsoever as to the source of those 81 billion.

But let me tell you a parable.

I am familiar -- intimately familiar -- morbidly familiar -- with three Xerox machines!

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1 PROFESSOR MILLER: Some of my best friends are
2 Xerox's!

3
4 One of them is in the Faculty Library of the Harvard
5 Law School.

6 One of them is in the corporate headquarters of
7 a subsidiary of a major American corporation which shall go
8 nameless.

9 The other is in the machine room of a major Wall
10 Street law firm, which shall go nameless.

11 I spend my idle time watching these three machines
12 and, on the basis of my experience, there is no way I could
13 conclude that the bulk of the problem is in that machine
14 at the Harvard Law School. In no way could I reach that
15 conclusion!

16 MR. LIEB: I did not say that, Professor Miller.

17 I said that the bulk of the problem -- the most
18 urgent need that is felt today -- is the need for journal
19 articles -- primarily technical, scientific and medical,
20 the supply of which, in many instances, is, concededly,
21 an infringement.

22 The support for the statement is that the Palmour
23 Report said that some vast proportion -- 75 or 80 percent
24 -- something like that -- of material passing in the
25 Interlibrary Loan Program was copies--photocopies--of

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1 journal articles.

2 There was very little copying in the Interlibrary
3 Loan Program -- very little copying done -- of monographs
4 and theses, and very little copying from books.
5 The bulk of the problem was in journal articles.

6 PROFESSOR MILLER: But not necessarily in the
7 academic library situation.

8 MR. LIEB: I did not say that. I really did not
9 say that.

10 PROFESSOR MILLER: Well, before--when you were
11 suggesting that we narrow our focus in terms of mechanisms,
12 it sounded as if you were suggesting that we should single
13 out the library context.

14 MR. LIEB: No. That is my fault. I did not
15 elaborate. The focus that we have at the minute: we
16 want to start with the library of the Bell Telephone
17 Laboratories, Westinghouse, General Electric -- we
18 want to start with what we call industry-related
19 libraries, who are copying, today -- who admit it; who say,
20 "We are copying.. We concede that much of it is probably
21 infringement. We want to pay. You don't tell us how we
22 can, practicably, pay. -- Tell us how we can pay."

23 My theory is that if, in the course of the next
24 six months, we can set up a system for them to make payment
25 and, if the system is practicable and works, that it will

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1 gradually extend in others -- other kinds of libraries will
2 join it.

3 It is a beginning. It is not intended to be the
4 full solution to a full problem.

5 PROFESSOR MILLER: And--if I now understand you--you
6 are saying that the modular unit for the beginning is the
7 journal--

8 MR. LIEB: Yes!

9 PROFESSOR MILLER:--However you define it in terms of
10 these "buzz" words: "technical", "scientific", "economic".

11 MR. LIEB: That is where we thank the demand -- the
12 big pressing demand -- is.

13 PROFESSOR MILLER: Without regard to where the
14 copying is taking place--of that journal -- Industry,
15 Academics, Government.

16 MR. LIEB: We attempt to solve -- we have a two-
17 pronged approach: one for the supply of prints of
18 those who want prints, such as the NTIS customers; or such
19 as those who get their prints through the Interlibrary
20 Loan Program. And the second half of the program
21 would be to provide a licensing and payment mechanism
22 for Ben Weil's Exxon Industrial Library to make the copies
23 it wants, and to make payment for so doing.

24 MR. NIMMER: Suppose, ten years from now, it should
25 turn out that there will be as acute a demand for copies of

1 works in English as there is today in Physics. Would you
2 oppose a similar mechanism there?

3 MR. LIEB: Well, I don't know.

4 I really am not trying to avoid an answer.
5 All I want to say is that our focus has been on how to
6 solve immediate and pressing problems.

7 MR. NIMMER: Charles, to restate what I am
8 getting at: Is your limitation to scientific journals
9 based on the pragmatic point that there is only a demand
10 for scientific journals--or is it based upon some principle
11 position that the needs of Science are more acute to Society
12 than the needs of Literature and, hence, you are willing to
13 give up part of your copyright for Science, but not for
14 Literature?

15 MR. LIEB: I think both. Both.

16 MR. WEDGEWORTH: Isn't there a very important
17 point, here, that there is a class of institutions that are
18 precluded under the present Copyright Law from making
19 copies? Firms such as the one Mr. Weil represented
20 yesterday, whose libraries are information centers, yet
21 are not open to the public as defined by the law? And
22 that is what you are suggesting to us is that/where you plan to
23 start to test this marketing mechanism--with the assumption
24 that what proves to be valuable in that context is
25 likely to be generalizable to a larger -- well, the other

1 classes of institutions which you may provide service for.

2 MR. LIEB: With one minor amendment, yes.

3 With one minor amendment to what you say: Not only
4 because some libraries, like Ben's, will not have the benefit
5 of 108, but all libraries will have the benefit of "fair-use"
6 copying -- whatever that is, and to whatever extent.

7 Some of the copying that Ben does, exceeds what would
8 be permissible under 108,--even if he qualified as a library
9 under 108. Some would come within 108, and some is do-able
10 -- regardless of 108 -- just as "fair use". But, yes, we
11 think that there is the great problem. We really don't
12 know what is going to happen if this problem is not solved
13 quickly, because we believe that it is much better to solve
14 modules -- first modules.

15 MR. WEDGEWORTH: I think I understand that.

16 I guess the part that I question is that you
17 could develop a model which will adequately service the
18 range of interests as represented by that group of institu-
19 tions which, admittedly, is quite narrow -- I would suggest
20 it would be satisfied within the range of 1,000 journals;

21 That the primary constellation of the copies is
22 geographically concentrated in terms of actual location
23 of those centers;

24 And then expect that model to be one that you could
25 apply where the parameters are entirely the opposite.

1 MR. LIEB: Well, yes. Maybe. Except, remember,
2 that you made a start with interlibrary lending.

3 Apparently, it was the feeling that the "Rule of
4 Five"-- at least with respect to journals -- would
5 probably accomodate most of the copying requirement within
6 the Interlibrary Program for journals.

7 MR. WEDGEWORTH: No. I am not referring to
8 that as a factor. I am referring to two things that
9 we know for a fact. That is, the concentration of use
10 of journal literature -- that the data that Gene Garfield
11 has developed and ISI shows very clearly -- that you take
12 a certain number of journals, and you can supply probably
13 75 to 80 percent -- then, sometimes, 90% -- of the
14 requests in this well-defined area of Science and
15 Technology.

16 Then you take the second fact that you have a
17 large, generalized network of interlibrary loan connections
18 serving a vast geographical area.

19 To me, these are the two most critical elements
20 in the development of any clearinghouse model. And you
21 are saying that you are developing a model which goes in
22 the opposite direction to the two most critical elements, in
23 my opinion. I am saying that I question the logic of
24 it.

25 MR. LIEB: Let me give you the outline of it and,

1 possibly, we will end up at the same place -- at least, I
2 hope we do.

3 My second point, or principle, is that we believe
4 that the economic factors that are involved in the pricing
5 of "separates" -- reprints -- are complicated; that they
6 involve not only the determination of the direct and indirect
7 course of supplying the copy but, also, the effect which the
8 availability of separates will have on subscription income
9 and, therefore, the ability of the publisher to collect
10 and to publish the articles in journal form.

11 It will take time to develop all of the relevant
12 economic factors to get the answer to this, but the publishers
13 with whom we are working in the for-profit and the not-for-
14 profit sector are willing to experiment. They are willing
15 to take a chance and go off into the unknown -- not being
16 sure as to just what will happen.

17 I add the comment that, in the meantime, they should
18 be encouraged ; -- not hindered by NTIS's parallel proposal.

19 Third: We feel very strongly that the supply of
20 copies -- except for fair use within the existing CONTU
21 guidelines -- is the function of the publisher, or of the
22 licensee, and should not be undertaken by NTIS or by any
23 other Government Agency.

24 We expect that, notwithstanding the CONTU guidelines,
25 that libraries -- we hope -- will find it easier and more

1 practicable to order copies -- "separates" -- from the
2 private sector, rather than through the existing inter-
3 library arrangements.

4 We are aware that libraries are, really, not happy
5 about being in the copying business. As we see what is
6 possible in the way of a system of supply centers, we think
7 that, ultimately, what now goes through the interlibrary
8 exchange can come from the publisher or the licensee.

9 We prefer, finally, on this aspect, to leave the
10 supply of copies to what I call the "Information Industry"
11 companies -- those in existence and those that will be
12 formed.

13 However, if they don't successfully meet the demand
14 for prints--for "separates"--publishers would consider
15 establishing cooperative print supply centers--provided
16 antitrust protection would be received for the operation.
17 I hasten to add: not antitrust protection for pricing,
18 which would be done on an individual basis, but Anti-Trust
19 protection for the cooperative effort. So that our
20 problem -- before I go on to the on-the-premises photocopying
21 problem -- our problem, as we see it during the months ahead
22 this year -- 1977 -- is to get some sort of cover, hopefully
23 by assistance from you, or protection from attack or hostile
24 attitude by the antitrust Division, and attempt to encourage
25 existing and other companies to set up what I call Print

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1 Supply Depots. -- They don't have to have them in inventory;
2 they can be licensed to copy on demand -- in the different
3 geographic areas of the country.

4 We don't see any reason why it would not be possible
5 to do what Ed Lowe used to say he does in Florida. He
6 gets something overnight from Tallahassee, or wherever.
7 But that is if you have enough branches or enough companies
8 in different geographic areas of the Country to meet
9 an existing demand.

10 Well, that is the first aspect of what we are doing.

11 The second aspect relates to the premises of
12 photocopying. Here, I think it relates primarily to the
13 industry-related information centers such as Ben Weil operates
14 for Exxon.

15 We say that we recognize that some users -- notably
16 industry-related information centers -- desire to produce
17 copies on the premises.

18 We also know that most of these companies are willing
19 to pay for the copying privilege, although at the present
20 time, they find it difficult to obtain individual permission
21 and to establish a single channel for payment, instead of
22 paying 500 different publishers.

23 We therefore recognize the need to establish
24 a single collecting and distributing center so that all
25 payments can be made at the same place. We think it is

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1 practicable. We are aware that the King study is on the
2 way. We think what I call the Dumbarton principle --
3 the proposal that was originated at the Dumbarton meeting
4 some years ago -- is workable--at least initially--and that
5 would involve the placing of the code -- an eye-readable
6 code, initially -- at the foot of the first page of each
7 journal article which would state what the copying fee is,
8 and which would identify the publication and the journal
9 article, probably.

10 We would expect to establish a single agency
11 -- hopefully in the form of a not-for-profit company and
12 hopefully, with a tax exemption -- so that we could get
13 some support--which I think would be available--from
14 Industry, and from Foundations, to get this thing started
15 for a couple of years. and a Ben Weil-minded-librarian,
16 who would say, "Well, I am really not interested in the
17 difference between fair use and copying beyond fair use
18 because it is too expensive to keep track", would then
19 keep track and would then keep an extra copy -- initially,
20 I said a Model T System -- an extra copy of the first
21 pages of all of the copies he made without attempting to
22 determine what is fair use and what is not; each quarter
23 would send them in, in a bale, to the collecting center
24 which would put them on a computer and which would determine
25 who is entitled to the fee. And those who wanted to

1 distinguish between fair use would do so, and would just
2 report for what was beyond fair use.

3 We would have no concern--in this small area--about
4 the problem that occupied you yesterday for a time: "as to
5 whether there would be compliance." We have, interestingly
6 enough, a very different problem that exists today. We
7 have a problem where Counsel to some large companies are
8 calling us and saying, "We are about to issue an edict
9 to discontinue all copying because we think it may be in
10 violation of the new Statute."

11 They don't realize that the new Statute does not
12 create a new law. But they are taking it as if it were; and
13 we are urging them -- I am talking now of the industry-
14 related libraries -- not to interrupt their present practice
15 until we can work something out. We are not concerned
16 about compliance. We think compliance will follow, in this
17 area.

18 MR. NIMMER: Where do unsupervised machines come
19 into this?

20 MR. LIEB: In the Pattison language which was not
21 made part of the Statute. But in the language of Congressman
22 Pattison in the House Report, he said that the section
23 in 108 with respect to no liability for unsupervised use
24 of a machine would not apply -- would not apply -- to an
25 industry-related library. That is the principle we follow.

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We are assured -- I should not say "assured" -- we believe that in the industry-related libraries, there will be efforts -- there are efforts -- to control the use of a floor machine.

MR. NIMMER: I am not getting at the question of whether 108 covers industry libraries or not, nor whether industry libraries are as responsible as public libraries in terms of living up to the law. I am willing to assume that--at least for now.

But is it a presupposition of your plan that truly unsupervised machines -- not industry libraries but machines in the hallway of public or private libraries, where the individual goes up and uses them -- that those will not be used to any appreciable extent for the kind of copying you are talking about?

Or, otherwise, isn't there just a way out of this whole mechanism that will be bigger -- the exception will be bigger than the main body?

MR. LIEB: Well, it certainly is an escape hatch
-- a way out. Nobody knows, really, what goes through
those unsupervised machines. I make copies every day out of
material that we have in the library, so I can have the
convenience of reading the copy on the train in the
evening. That kind of copying is ^{of} no concern. I think it is
fair use copying. We have the original.

1 MR. NIMMER: Just because you don't have the
2 patience to sit by and --

3 MR. LIEB (Interposing): I don't want to carry
4 a big book!

5 MR. NIMMER: And beyond that, it would go beyond
6 fair use.

7 MR. LIEB: I want to carry a print of what we have.

8 JUDGE FULD: Mr. Weil, did you have something?

9 MR. WEIL: Yes. I have a statistic that may be
10 of interest here. We made a survey, in 1973, of the percent
11 of copying of copyrighted materials that was going on
12 through our service, and that individuals were doing for
13 themselves. This was a 100% survey of our professionals,
14 to the best of their ability to report what they were doing --
15 and, remember, nobody was keeping count.

16 They indicated to us that 75% of the copies that
17 they were obtaining were obtained through our library; and
18 something less than 25%, they were making on unsupervised
19 machines.

20 Now, again, we have a good "system" -- if you want
21 to use that horrible word -- to provide them with copies
22 and consequently, that "system" -- if you want to use that
23 horrible word -- is working.

24 MR. NIMMER: That statistic would be very
25 interesting.

1 MR. WEIL: I have data to back it up.

2 MR. NIMMER: Can you give us the source of that?

3 MR. WEIL: These are studies I made myself, in 1973,

4 I still have the questionnaires, and so
5 forth. I would be perfectly willing to turn these over.

6 JUDGE FULD: You might submit copies.

7 MR. WEIL: Well, I will supply the copies of the
8 results-but I even have the raw data.

9 MR. LIEB: Well, that is, really, my story. We need
10 a lot of cooperation. That is my final plea. We need
11 cooperation from you in seeing the problem that we have;
12 certainly, in protection for the cooperative efforts which
13 have been requested of us by Congress and by you but which,
14 possibly, are not fully understood by the antitrust Division
15 of the Department of Justice.

16 We need cooperation from the Secretary of Commerce;
17 and from Bill Knox; and from Peter in not pressing their
18 proposal. We recognize that this is a political problem,
19 and not a legal problem.

20 Our real reason for discussing that at length was
21 in the hope that you would not encourage it. We know that
22 you cannot control it. That is a political matter.

23 We are also going to suggest that we need coopera-
24 tion from the Register of Copyrights. We hope that in the five-
25 year period that is ahead of us before the Register is

1 required to submit a report -- during that period -- the
2 Register will be collecting copying statistics on an
3 on-going basis, to determine where the copying is.

4 Now, I don't think the Register needs a law to
5 enable her to acquire that. I think that a request -- a firm
6 request -- from the Register will produce much of that
7 material. If that is made public and analyzed, we will
8 know a lot, more five years from now than we know now.

9 Thank you.

10 MR. FRASE: Mr. Lieb, as you probably know, we had
11 testimony at our October hearing from Gene Palmour who was
12 working with the National Commission on Libraries and Informa-
13 tion Science, and a proposal for a National Periodical Bank
14 in the United States similar, in some ways, to the BLLD in
15 Boston Spa.

16 It is my understanding that the study is nearing
17 its end and will be presented to the National Commission
18 on Libraries and Information Science in February.

19 Would you extend your opposition to NTIS, to that
20 operation as well?

21 MR. LIEB: You give me five minutes on what I
22 think is a subject that requires five days of discussion.

23 I would like to state my views, which are untested,
24 I cannot tell you who shares them, as yet.
the

25 In my view, /unauthorized copying that BLLD does

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1 at Boston Spa, when it comes into this Country,
2 will be infringing copies. Those copies will be in-
3 fringing copies under 602(a)(3) and, in my view, also,
4 they can be considered piratical copies under 602(b),
5 so that their entry could be restrained by the Customs
6 Service.

7 It is a long and a very complicated argument,
8 and I guess this is not the time to go into it, but I
9 would start with BLLD and say that I think that that is
10 clear infringement.

11 I would go further. I would say that a National
12 Periodical Center that might be developed, the prime purpose
13 of which would be to supply prints or photocopies of
14 copyrighted journal material without the consent of the
15 publisher, would not fall within the provision of
16 Section 108; of the proviso of Section 108(g)(2) and would
17 therefore be infringing systematic-copying which would
18 be forbidden by 108.

19 that
20 MR. FRASE: Would you propose/the National Periodical
21 Center, like the NTIS proposed, pay a fee for copying.

22 MR. LIEB:
23 -- That would be fine. That would be fine! That is
24 probably fine for the large publishers and the large circula-
25 tion journals--a couple of whom I represent-- but is
probably very bad for the publishers of small and esoteric

1 types of journals--who have to charge a very high subscription
2 rate. Now, the Center would have to negotiate a different
3 price for each company.

4 MR. FRASE: Let me add another element.

5 One of the possibilities for running this National
6 Periodical Center would be the Library of Congress.

7 Now, would your objection to / ^{an} NTIS monopoly extend
8 to the Library of Congress?

9 MR. LIEB: I was frank before, when I said that
10 ultimately--down the road ten years -- whenever -- I think
11 ultimately there will be a need felt for a universal
12 system. What I mean by a universal system is a system
13 under which anybody -- in any library -- can make a copy
14 knowing that he will not be infringing and will account
15 for the payment that is required. That is not compulsory
16 licensing as such. That is sort of in-between.

17 MR. WEDGEWORTH: Whether it is fair use, or not?

18 MR. LIEB: Well, I am always assuming that fair
19 use copying is permissible. I am not trying to eliminate
20 fair use copying. If records are kept to distinguish
21 between fair use and non-fair use, fair use need not be
22 paid for.

23 MR. WEDGEWORTH: That also applies to your comment
24 about the British Library Lending Division?

25 MR. LIEB: My trouble with the BLLD is that I don't

1 think they come within the framework of fair use. They
2 are unauthorized -- as I view it -- piratical users, and the
3 doctrine of fair use does not apply to them.

4 MR. WEDGEWORTH: Notwithstanding the exemptions
5 for schools or educational and scholarly purchases?

6 MR. LIEB: Well, 602 requires careful analysis.

7 I see everybody is getting tired and impatient.
8 My view is "No". My view is that their copying is not
9 sanctioned by 602.

10 MR. WEDGEWORTH: I would appreciate a letter to the
11 Commission from you on that--with the permission of the
12 Chairman.

13 JUDGE FULD: Surely.

14 MR. LIEB: I would welcome the opportunity.

15 But I am saying that ultimately, I think maybe
16 with respect, again, to technical and scientific material,
17 and not to anything else, ultimately we may have to make
18 the choice:

19 First, do we need universality -- the right to make
20 the copy and make the payment?

21 I think, ultimately, we will be saying "Yes" and
22 then, the path score: You either do it through a Statute
23 such as was contemplated at Dumbarton -- and contemplated
24 earlier with respect to prints at the Cosmos meetings
25 -- do it by a Statute which, in fact, gives the permission

1 but requires the payment, in the private area; or, else,
2 maybe you might have to use a mechanism such as NTIS.

3 MR. NIMMER: Just briefly--to conclude--I
4 think it is crucial:

5 This universal system -- I think we are all
6 in agreement that, ultimately, that has to come. But
7 if that comes, and if it comes in a private context -- as
8 you are suggesting -- then I think somebody has to
9 inevitably face up to the antitrust implications.
10 That is; what you are suggesting is "the private sector would
11 have a monopoly if it is universal".

12 Let me explain what I mean.

13 If it is a universal system -- as everyone agrees
14 it should be -- then your entity is going to be representing
15 all of the available works. If you add to that, that
16 the pricing will be determined by the private sector without
17 any kind of governmental oversight, then, well, don't
18 you get into the kind of thing that ASCAP got into?
19 That is, there has to be -- or the Courts have thought and
20 I think probably soundly, as a matter of policy -- that
21 there has to be some oversight -- governmental oversight
22 -- so that the pricing is fair; you can't gouge the market.

23 If that is true, it does not necessarily have to
24 take the form of antitrust law, but there has to be some
25 kind of guidance and limitation. Might that not, alter-

1 natively, come in the form of what is rudely called
2 a "compulsory" license?

3 MR. LIEB: Well, at Dumbarton -- or was it at Cosmos?
4 I get confused, now -- we were talking of a principle under
5 which the price of a "separate" would bear some mechanical
6 or formula relation to the subscription price--which would
7 prevent gouging; which would prevent unfair prices.
8 I think that it is possible that we would be willing to see
9 such a principle incorporated in the Statute.

10 MS. WILCOX: Maybe you can help me a little bit.

11 If I understand you correctly, what you are saying,
12 now, is there are two prongs. One is to adequately
13 compensate the older copyrighted works, and the second
14 is to find some way to operate within the law of infringe-
15 ment.

16 Now, I have difficulty in understanding the dis-
17 tinction; or how you would get your copies.

18 Would that be under getting "separates"?

19 MR. LIEB: Do you mean in my office; that I use?

20 MS. WILCOX: Yes.

21 MR. LIEB: Oh, no.

22 MS. WILCOX: Would you get those under paying a
23 royalty to one of these centers?

24 MR. LIEB: No. I would not pay for them at all.

25 I am not trying to eliminate the fair use principles.

1 MS. WILCOX: Then maybe you can explain -- I am
2 not a lawyer, so I don't understand "fair use".

3 MR. LIEB: Let me start with what, to me, is the
4 simplest answer, and is familiar to the lawyers at the
5 table.

6 We subscribe -- every law office has hard bound
7 books; bound books, and loose-leaf books piled sky high.
8 We have them all! We have enough, to use, for everybody in
9 the office.

10 I call. I get the book. I get an 1876 U.S. -- that
11 is a bad example -- a West Digest--which is a copyrighted
12 book -- for a decision of a Court, and it is in a
13 volume this thick.

14 Now, our office only needs one set of West Digest,
15 but I say, "Well, that is a long opinion. It is 14 pages
16 of close reading. I want to read that on the train this
17 evening, or at home this evening."

18 So I have it photocopied, and I read it on the train.
19 I make some notes on it and, the next day, I throw it away.

20 Now, in the furthest stretch of my imagination,
21 whether you do it or I do it, it would never occur to me
22 that that copy should be paid for. In my view, that is
23 clearly a "fair use" copy. So that we are not focussing
24 on the copying that is generally done in a law office.
25 The copy that a law office may take of a Bureau of National

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1 Affairs Patent Trademark and Copyright Journal costs
2 two or three hundred dollars a year. If they have 150 lawyers,
3 and they have thirty lawyers who are interested in that field,
4 and if they only subscribe to five copies, or, instead, they
5 subscribe to only one copy and make copies of the journal
6 and send them out immediately to the thirty lawyers, that
7 is, clearly not "fair use" copy. That is, clearly,
8 infringing copy.

9 MR. PERLE: How about an office that has ten lawyers,
10 where the senior partner reads an article -- a copyrighted
11 article -- and says to his secretary, "Every lawyer in this
12 office ought to have a copy of this. Make it and give it
13 to the lawyers."

14 MR. LIEB: Well, you can push it. If he does
15 it once or twice a year -- if he sees an opinion that is
16 just great, and happens to be published in West, and the
17 headnotes are copyrighted, but it is public-domain material
18 I don't think that the publishing industry is concerned
19 with that.

20 MR. PERLE: Or are you saying that he is doing that
21 at his peril?

22 MR. LIEB: At your peril, you jay-walk. I jay-walk
23 every day.

24 MR. PERLE: The reason I am asking this, Charles,
25 is: We have had a lot of testimony on this that goes all

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1 over the map. Yesterday, somebody testified that the
2 technology simply does not exist and probably won't exist --
3 I think he said. -- for the machine to be self-policing
4 and self-recording on copyrighted material.

5 You say that fair use is okay--but we don't know
6 where fair use copying stops. We never will. That is all
7 subjective.

8 We have had testimony that indicates that most
9 infringing copying by photocopying is done--not by system-
10 atic photocopying--but by centers that are designed to
11 supply other people or, incidentally, supply other people
12 by Commerce and by Government. That is where the
13 greatest volume of infringement exists.

14 MR. LIEB: By Government, did you say?

15 MR. PERLE: By Government and by industry, in a way
16 that we simply don't know about. And your testimony
17 today -- the part of it that I was able to hear --
18 seemed to indicate to me that the thrust of what the AAP
19 is doing is trying to set up some sort of system that will
20 work, where there is systematic photocopying.

21 Now, I see this threat emerging, that maybe what
22 we ought to be recommending -- I am not saying this is my
23 view -- I think this is being said -- something that
24 will provide for some sort of clearinghouse arrangement where
25 there is systematic photocopying, but where the unpoliced

1 machine--or where the office machine is used in an infringing
2 way; someone does that at his peril.

3 MR. LIEB: I think so, yes. I would subscribe to that.

4 MR. WEDGEWORTH: Mr. Lieb, just one quick point.
5 It bears on this difficulty of really understanding what
6 "systematic" is. I think that we are not really going to
7 come to grips with some of these problems until we try to
8 put that aside because I was just sitting here, thinking
9 that if we had a young graduate student sitting in your
10 place, and the graduate student was describing to us how
11 she or he went about their work, and he said, "Well, you
12 know, I write approximately one dozen papers a year, and
13 I spend so many hours a day in the library, and I make
14 so many copies of articles, and I make my notes in the
15 margins of those articles. When I finish the paper, I
16 throw them away."

17 I think that, on the basis of what you said this
18 morning, about how you operate, and on the basis of how that
19 individual might operate, that you might conclude that that is
20 not systematic copying; that, as you said today, you
21 consider that to be fair use.

22 Yet, when you go to the librarian in your law firm,
23 or you go to the librarian in that university, and he
24 says, "Well, we see three or four thousand students a day.
25 Those three or four thousand students a day account for so

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1 many copies of articles over a set period."

2 The librarian in a firm says, "We have ten lawyers"
3 or 150 lawyers, "and they account for so many copies that they
4 are using for their own personal use."
5

6 The idea of systematic, as distinct from isolated,
7 just becomes impossible.

8 MR. LACY: Well, if I may say it now, there is
9 a distinction between the individual to whom it is not
10 a realistic alternative to buy a copy of every issue of
11 every journal out of which he is photocopying an article
12 for a graduate student's use.

13 It is a realistic alternative for a library--when
14 they find that 500 students, in the course of a month, are
15 requesting photocopies from articles of a journal to
16 which they do not have a subscription--to subscribe to
17 it. I don't think you can put the librarian with the
18 individual student. I am talking about the librarian and
19 the student, on all fours; as a comparison.

20 MS. WILCOX: That may be true but, if our problem
21 is adequately compensating the holder of a copyright--
22 whether it be the publisher or the author--if our problem
23 is to solve whether we are operating within the law, shouldn't
24 we really be focussing on the universe of the problem, rather
25 than on a very small segment--just because, by accident,
it is an institution, and is easy to focus on?

1 MR. LIEB: May I reply to that?

2 First of all, I suppose it is a question of
3 procedural philosophy. Do you try to do one thing at a
4 time, or do you try to do everything at a time?

5 My preference is: one thing at a time.

6 It is not, really -- although it is still very
7 skimpy -- it is not as desperate as it sounds. We have made
8 starts. We have come to agreement, as you know, with the
9 educators -- a very important agreement -- which should
10 control a substantial amount of infringement copying that
11 had been going on. We are getting cooperation, I think,
12 from educators. Just a couple of weeks ago, at Tufts ,
13 a campus paper covered a full page advertisement of the
14 guidelines, requesting cooperation from the faculty and the
15 student body.

16 And that was a great, big, bleeding sore, -- as far
17 as infringement was concerned. We made, I think, a very
18 constructive step there.

19 You have taken constructive partial steps in
20 libraries and, if we gradually piece the thing together,
21 the next most urgent thing, as we see it, is: the industry-
22 related and other special libraries will wind up, hopefully,
23 with various things which will form a mosaic of protection.

24 I don't believe that there is one solution to the
25 universe of photocopying. That is a belief that I hold to.

1 I think that different kinds of material, and
2 different circumstances, require different kinds of control.

3 MS. WILCOX: I am glad you say that because I would
4 hope that there would be an opportunity for not only the
5 private sector -- the publishers -- but, also, some
6 corporate use of the users. The individual user cannot speak
7 for himself. Many users are going to have to depend on their
8 representatives, the librarians.

9 JUDGE FULD: Do you have a question, Dan?

10 MR. LACY: Yes, I have three or four questions.

11 JUDGE FULD: Go right ahead.

12 MR. LACY: Some of these are, really, comments--
13 rather than questions.

14 Charles, I am sure I really don't have to say what
15 I would like to you, but I would like to, for the record,
16 state that I would hope that any proposal we have dealing
17 with journals does make a distinction between journals and
18 news letters. That is a line that is vague, and somewhat
19 hard to draw, but the economic characteristics of news
20 letters -- which depend, to a high degree, on timeliness --

21 are usually very slender publications, reproducible
22 at negligible cost as artifacts, but in whose compilation a
23 vast amount of money might have been spent, and where the
24 subscription cost is very high, and
25 really does not lend itself
to the economics of the conventional journal publisher.

1 A couple of other comments.

2 Just as a matter of clarification: When Mr.
3 Wedgeworth expressed his surprise at your comment about
4 Government publishing, am I correct in assuming that you were
5 not talking about the Government's publication of its own
6 emissions in the same sense of a corporation publishing
7 its annual report of documents; or a church, or anybody
8 else does. But the Government performing that function
9 that the private publisher has: of being a broker to whom
10 an individual author comes and finds a means of reaching
11 the public and, while it might be perfectly proper for
12 the Government to publish its own writing, it would be
13 unfortunate if the private author had to apply-himself--
14 to his Government -- as in many Countries he does --
15 to find a channel for his publication of his work.

16 MR. LIEB: That is right.

17 MR. LACY: A couple of other points.

18 I think we are all aware that we are dealing with
19 two sets of problems, in terms of time range.

20 I think the Congress, itself--when it enacted the
21 1976 Act--felt discomfort about 108, and some aspects of
22 107, as a final long-range solution of reprographic problems.
23 They wrote into the law a provision for a five-year review,
24 and so on, and so on. So that all of us have a question
25 of working out the implementation of the 1976 Act, with

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1 guidelines, clearinghouses, and that sort of thing.

2 This Commission is faced with the responsibility
3 of recommending to Congress a more ultimate and long range
4 solution.

5 Now, in the short range -- and hitherto -- it
6 seems to me that we dealt with an assumption that
7 the basic job of conveying the sort of information materials
8 and journals -- just to take the journals, as what we are
9 talking about now -- would be done by the journal itself,
10 in its printed edition. But we recognize that that
11 did not reach everything; there were fringes beyond it.

12 There was the student or the faculty member in the
13 relatively small college that had no rational need to take
14 everything in a given journal--if it needed a particular
15 article.

16 There was the person for whom it was not reasonable
17 to buy the whole article, who needed the individual thing
18 and, hence, the photocopying machinery was an extension,
19 a lubricant, on a thing that filled in the borders that
20 the subscription could not do. It was an ancillary device
21 of normal general publishing.

22 Now, it seems to me one of the problems -- not
23 so much "problems" as opportunities -- we face today is
24 the existence, simultaneously, of computers, as a means of
25 reducing transaction cost, and reprographic equipment, as

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1 a means of reducing the cost of small-edition reproduction.
2 It affords us an opportunity to think about the fundamental
3 problem differently. As I said before: The question of how
4 to publish the document of a few thousand words in length--
5 characteristic journal article research--always bedevils.
6 It has not been practical to publish those separately.
7 No library could afford to scan lists of thousands and
8 thousands of such documents and make selections of which
9 ones they would buy.

10 No publisher could handle the cost of advertising,
11 accepting orders, and filling these.

12 Traditionally-- hitherto--we have always
13 dealt with that by collecting these into journals, so that
14 a library not only can buy just one issue, it can buy one
15 subscription and then, indefinitely, get the journal of
16 whatever it is.

17 The publisher does not have to sell each article nor,
18 indeed, each issue. He sells a subscription to the journal.
19 The whole transaction cost is very simply handled.

20 The transaction cost, also -- You know, you
21 print every article for every subscriber to the whole
22 journal--which is wasteful in some degree. Probably the
23 great majority of subscribers to a great many journals
24 only use 10 to 15 percent of the content of the journal.

25 Now, we have a situation, today, in which some part

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1 of the problem of publishing this-length document -- much
2 of which escapes publication entirely today, because no
3 journal can afford to take it in, and it just exists as
4 mimeographed research. It seems to me that we have got
5 the capacity not to consider reprography solely as a
6 supplementary device -- a marginal supplementary device --
7 to a basic publishing thing, where we are only concerned,
8 primarily, with the impact on the basis of publishing, too.
9 We have the fact that some types of materials may actually
10 increase, in the primary publication, as separates. We can
11 produce separates cheaply; we can control the transaction.

12 I would hope that in the long range thinking of
13 this Commission as to what it recommends to Congress, it
14 could have the benefit of thinking, now, of a particular
15 constituent; and, associated with the constituent, to
16 developing the legal material relating to reprography
17 in ways that would keep open the possibilities of developing
18 quite different methods of publishing a great many short
19 documents of this sort. I think our Copyright structure
20 should not be simply one of balancing rights under an existing
21 technology, but might be designed to afford incentives to
22 lead -- not the technology; I am not thinking simply of
23 hardware. I am thinking of institutional arrangements and
24 practices to provide incentives for their development over
25 the next ten or twenty years.

1 One last brief thing:

2 Would you like to comment now, or, perhaps, to think
3 about and let us have a memorandum later on what you think
4 the effect of 201(c) is on any of these arrangements?

5 MR. LIEB: I don't have the Act with me.

6 201(c) is "Contributions"?

7 MR. LACY: 201(c), --

8 MR. LIEB: I have a copy.

9 MR. LACY: 201(c), in the relevant portion of it,
10 says:

11 "In the absence of an express transfer of
12 the copyright or of any rights under it,
13 the owner of the copyright and the collective
14 work", and here, I presume the collective work
15 would be a journal, "is presumed to have
16 acquired only the privilege of reproducing and
17 distributing the contribution as a part of
18 that particular collective work, and any
19 revision of the collective work and any later
20 collective work in the same series. Clearly,
21 the author presumably retains the right to license
22 any reproduction of it in any form, other than
23 as a part of that particular collective work."

24 MR. LIEB: I think that here, again, you go off in two paths.
25 I think it is customary, in scientific publishing, for the

1 copyright--for the ownership of the article--to be
2 transferred to the journal.

3 MR. LACY: Right, By express agreement.

4 MR. LIEB: Well, up to now, there are many instances
5 where it has not been too express. I would assume that,
6 from now on, it will be express.

7 On the contrary, with articles other than
8 scientific and technical -- poetry, prose, general
9 articles, fiction -- there, it is customary for the author
10 to reserve all rights except the magazine publishing
11 rights;and, presumably, that will continue.

12 Now, what effect that will have on the granting
13 of permission use, I would think that the granting of
14 permissions for technical and scientific materials -- if
15 that is what we are talking about -- will be facilitated if, as
16 I expect, there will be express agreements entered into
17 between the scientific publishing journal and the authors
18 specifically providing the prints.

19 MR. LACY: As a matter of fact, it seems to me that
20 the autho~~r~~s, themselves - - I am sorry John is not here --
21 would be better protected and served if, even in the
22 case of other than technical and scientific and medical
23 journals, there was an express conveyance of the right
24 to license the reproduction of the article from the physical
25 text that appears within the journal. That is, the

1 photocopying of the article--as distinguished from publish-
2 ing the article somewhere else, because it would be an
3 obvious impracticality for any author to effectively
4 assert his rights over photocopying. Any clearinghouse
5 scheme will collapse if the publisher is not in a position
6 to convey the rights to photocopy the articles in his
7 journal. and the clearinghouse or the potential user, like Ben Weil,
8 has to chase down 1,000 publishers and a million authors.

9 MR. LIEB: If only because I know that you will be
10 hearing Irwin Karp, I forebear making any comments about
11 the author of the article that is published in the
12 New Yorker magazine!

13 JUDGE FULD: Any other questions?

14 MR. PERLE: Aside from that terribly vital point
15 that Dan Lacy brought up -- it is a mischievous point,
16 but one I think we ought to clear up: Insofar as photocopying
17 is concerned--at least in its present mode--there is a
18 Copyright Law of 1976.

19 Does the AAP believe that there is any change
20 needed in the law as it will exist on January 1, 1978, or
21 is it merely interpretation and enforcement of the law -- an
22 implementation of it -- that is needed?

23 MR. LIEB: Well, that is a broad question.

24 JUDGE FULD: You might want to put it in writing
25 and send it to us.

1 MR. PERLE: It is a vital question, it seems to me,
2 for this Commission.

3 MR. LIEB: There is one thing I know that we
4 would probably like. It was touched on before; about
5 Anti-Trust exemption. There was an Anti-Trust exemption
6 put in Section 118, with respect to Public Broadcasting,
7 which goes much further than the Anti-Trust protection that
8 we require for cooperative action. So that is certainly
9 something that we would look for but, as to the balance, I
10 don't think we are clear enough in our minds, yet.

11 MR. PERLE: Could you let us have it?

12 JUDGE FULD: After you reach a conclusion, you might
13 write to us.

14 MR. LIEB: Yes.

15 JUDGE FULD: Any other questions?

16 Thank you very much. You have been very
17 enlightening.

18 Our next speaker is Paul Zurkowski. The Commission
19 is pleased to welcome him. He is the President and Executive
20 Director of Information Industry Association, in which office
21 he has been since 1969.

22 Before that, Mr. Zurkowski served two terms as
23 Legislative Assistant to Congressman Kastenmeier. He is
24 a frequent lecturer on the relationship of information
25 libraries.

1 Today, he will talk to us about the views of the
2 IIA on the supplying of authorized photocopies and the
3 licensing of photocopying.

4 Would you be able to summarize?

5 MR. ZURKOWSKI: I will try to. So many of the
6 questions that you addressed to earlier witnesses were
7 covered by the material, and we will just have to pass over
8 it, but I will try to synopsise.

9 JUDGE FULD: Yes.

10 STATEMENT OF PAUL ZURKOWSKI, IIA
11 -on-
12 VIEWS OF THE IIA ON THE SUPPLYING OF AUTHORIZED
13 PHOTOCOPIES AND THE LICENSING OF PHOTOCOPYING

14 MR. ZURKOWSKI: I am always fascinated by the
15 perceptiveness of this Commission. You don't seem to leave
16 many stones unturned.

17 We do appreciate this opportunity to share in the
18 review of the NTIS proposal. I think at the outset, we have
19 that
20 to state/we oppose it on the grounds that it is an intrusion,
21 into the information marketplace, by the government; an
22 intrusion that is another intrusion, and one which I will
23 deal with a little later as to why it is objectionable.

24 Our basic position can be outlined as follows:

25 We think that the government should do only those
things that citizens are unable to do for themselves.

We think that the reprint service raises the whole
question of government competition and one -- if you are to

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1 make recommendations on the NTIS reprint proposal -- where
2 you have to take the question of the whole range of govern-
3 ment competition questions into consideration.

4 Finally, we had a task force meeting the day
5 before yesterday, at which people came from as far as
6 San Francisco and Louisville, and a lot of places that
7 are, perhaps, strange to the publishing world, to address the
8 question of the clearinghouse apparatus. We have a list
9 of suggestions in the ways that the Commission might be
10 able to take steps to assist in moving the idea.

11 I think that because we did not testify in
12 October on Library Networking, it is important that I
13 take a couple of minutes to share with you the experience
14 the industry has had; on which this position is based.

15 In the past year or so, the industry has seen the
16 emergence -- or the identification -- of three distinct
17 marketplace functions, particularly in the field of
18 secondary-publishing, information retrieval services.

19 The first is the equivalent of the industrial
20 age manufacturers. They are the producers of data bases.

21 These firms:

22 (a) Identify a universe of published materials
23 having a degree of homogeneity;

24 (b) make a selection as to those materials to be
25 included and excluded from the product;

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1 (c) abstract and index the material so that users
2 can, through the use of such finding tools, quickly ap-
3 propriate documents; and

4 (d) in some cases, microfilm all the documents
5 so that the specific piece of information identified
6 can be retrieved easily.

7 The second marketplace function is the equivalent
8 of the distributor. Several firms have:

9 (1) made arrangements with producers of data
10 bases to input multiple data bases into a host computer;
11 and made

12 (2) arrangements with industrial and library
13 users to provide on-line access to the data bases on the
14 host computer via typewriter-like terminals linked by
15 ordinary telephone communications to that host computer.

16 The National Science Foundation has estimated--
17 recently--that the available data bases -- that is, machine
18 readable bibliographic data bases -- have grown in number from
19 24 in 1965, to 160 in 1975; and that the total number of docu-
20 ments--identifiable through those machine-readable
21 data bases--has grown from 880,000 in 1965 to over
22 46 million individual identifiable documents in 1975. This
23 growth is continuing.

24 In talking to the source of that information
25

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1 yesterday, she told me that perhaps an additional 20 data
2 bases have become available in 1976.

3 This growth is attributable:

4 (1) to the growth in computer-composition-
5 capability making the content of many ink-print publications
6 available in machine-readable form; and

7 (2) to the growth of this distribution function.

8 The third marketplace function is the equivalent
9 of the retail function. A major phenomenon, in the information
10 business of the 70's, has been the development of the
11 "information on demand" businesses. More than forty --
12 both private and public -- can be identified today. Each of
13 these is kind of a prototype for the future. Some have already
14 spawned direct competition for themselves. They range in
15 function from performing document access services, to varying
16 levels of customized research. Many of these firms have
17 subscribed to available on-line distribution services and
18 regularly search two or more data bases in answering a
19 particular problem for a subscriber.

20 The result often is that when the subscriber
21 receives a computer printout of a custom bibliography on his
22 subject, he often requests copies of the documents--even
23 though most, if not all, may already be available in his own
24 library. It is a matter of convenience.

25 At a recent IIA Committee meeting, we estimated that

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1 eight to ten such document fulfillment services -- both IIA
2 members and outside the Association -- have supplied approxi-
3 mately half a million copies of journal articles in 1976.

4 What we are seeing is the first sign of what could become
5 a revenue-generating "aftermarket" for publishers for their
6 journal articles, on an article-by-article basis. What is
7 needed to stem the financial erosion of declining subscrip-
8 tions and the near elimination of reprints as a source of
9 revenue is a clearinghouse mechanism providing publishers
10 their price for the material copied.

11 This "aftermarket" is coming together on the
12 bases of several capabilities.

13 The information-on-demand firms have, over the past
14 half decade, established themselves as dependable sources
15 of reliable information on a "problem solving" basis. As a
16 result, they have created channels of communication to users,
17 through which great quantities of information are flowing.
18 This information takes many forms. At the present time,
19 document fulfillment is an additional, necessary service.
20 Some document fulfillment services rely principally on this
21 service for their revenues. Others offer document fulfill-
22 ment as a major service. The Institute for Scientific
23 Information and the University Microfilms offer wide, major
24 services of this kind. It should also be noted that ISI has, for
the past year or two, offered to use its own service

1 mechanism as a clearinghouse for performance purposes based
2 on agreements it has with publishers.

3 For other on-demand companies, document fulfillment
4 is not a principal service on which they currently depend,
5 in any significant way, for revenues. All, however, are pre-
6 pared to pay publishers for the use of their copyrighted
7 materials. Establishing working formulas is necessary to
8 further growth in this.

9 A second contribution to this "aftermarket" phenomenon
10 is the vast expansion -- over 46 million documents, in 160
11 data bases -- that provide the individual the opportunity
12 to treat individual journal articles as separately
13 identifiable bibliographic units; and it creates an inexorable
14 pressure from users to treat individual articles as separates.

15 Thirdly, the availability of these data bases for
16 search on essentially a "per transaction" cost basis. You
17 can sign up to search files on SDC and Lockheed host computers
18 for no membership, or other "front-end" cost, other than your
19 terminal rental, and the training that is required. And you
20 are provided information--in most cases with each
21 search--as to what the computer cost for that search was,
22 and what the communication cost for that search was.
23 That is already built into those services.

24 So, on one side, there is an emergence of an
25 activity which is identifying several levels of a market-

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1 place activity, here, where the ultimate benefit to the public
2 is going to be the availability, on a retail basis, of a
3 very small piece of a very large information service, at
4 retail cost.

5 While this was emerging in 1976, a parallel effort
6 was initiated to come to grips effectively with the need for
7 a payments clearinghouse mechanism.

8 Based in part on the work of the Copyright
9 Conference, a conference was held a year ago at which
10 the functions of a clearinghouse were rather thoroughly
11 explored.

12 Reaction to this effort from the library community
13 was a natural concern that some system would be imposed
14 arbitrarily. This tended to exacerbate the delicate
15 balance in the Revision Bill relationships, and clearinghouse
16 activities were set aside pending the enactment of the
17 Revision Bill.

18 While the Revision Bill settles many issues, there
19 remain many areas in which permissions and payments problems
20 still need resolution. This is particularly true in the
21 commercial document-fulfillment services.

22 If you go back to the original statement that
23 Government should not do what citizens are able to do for
24 themselves, I think that citizens -- the industry and
25 the publishers -- are positioning themselves to provide the

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1 services that NTIS is proposing, and that there is a
2 competitive, viable, technologically sound, economically
3 feasible, marketplace being created with non-government
4 money to perform the document delivery function that NTIS
5 proposes to operate.

6 And as to the reliance that NTIS makes of private
7 firms in obtaining documents, it is a service these firms offer to all
8 comers. Private firms supplying documents to NTIS
9 customers cannot be interpreted as an endorsement of this
10 government intrusion in their business.

11 I was really interested, Mr. Nimmer, in your sug-
12 gestion that this Commission might consider recommending
13 that NTIS be granted authority to operate in this area,
14 and. The second part of my presentation deals with the
15 problems that the Commission needs to address, before it
16 takes what I think would be a fairly drastic action.

17 MR. NIMMER: I don't think I suggested that,
18 Mr. Zurkowski. I wanted to explore what the pros and cons
19 of it are.

20 MR. ZURKOWSKI: Well, I appreciate the opening,
21 none-the-less.

22 From a policy viewpoint, consideration must be
23 given to the impact of Government participation in this
24 Information marketplace that I described. We think you
25 have to take into account--in evaluating the NTIS
proposal-- such questions as:

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- 1 1. To what extent should government publish?
- 2 2. To what extent should government market
- 3 information?

- 4 3. To what extent should government reprint
- 5 privately published materials?

6 Government already is involved in publishing. It
7 is marketing; it is reprinting. We believe these activities
8 cannot continue to expand, forever, without forcing significant
9 private activities out of business and preventing others
10 from entering. The NTIS reprint proposal is another example
11 of the expansion of government-for seemingly sound economic
12 reasons--into Information activities.

13 You see the same problem at the National Library
14 of Medicine, at the Defense Documentation Center, at the
15 National Network proposals under consideration at the Library
16 of Congress and otherwise.

17 Make no mistake about it! NTIS is doing all of
18 these three things! They are publishing, marketing,
19 and reprinting vigorously and at considerable expense.
20 If I were to mask over the name of NTIS on this document,
21 you would be hard pressed to distinguish it from any other
22 brochures of other companies in this business -- from
23 Academic Press to Petroleum Information Corporation, to
24 Lockheed Dialogue, to Control Data Instamatic, Unlimited.
25 They are all in the same business.

1 What are the practical implications of government
2 activities in this area?

3 Well, NTIS is acting with the implicit recognition
4 that it is the "official" publisher of the U.S. government.
5 It gets legislation written to require other agencies to
6 deposit their documents with NTIS. It may only be a small
7 part of the Department of Commerce from the Washington view-
8 point, but out in the hinterland, where publishers and informa-
9 tion companies must compete, make no mistake: This represents
10 not just conventional wisdom, but "official wisdom".

11 From whom will the uninitiated choose to buy?

12 The same official government role comes into play
13 when NTIS seeks reprint authority from professional
14 society publications, publications which receive government
15 subsidies in the form of page charges.

16 Do you think they can, really, say "No" to the government
17 when the government has paid some of the printing costs?

18 When NTIS markets information, it must emphasize
19 one product, or a set of products, at the expense of all
20 others. This power to disseminate implicitly involves
21 censorship. You can't get away from it! It involves a conscious
22 choice, by a government agency, as to what "officially"
23 is important and should be emphasized,--and what is not, and
24 should not be emphasized. That is marketing!

25 Internationally, this marketing effort by NTIS also

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1 creates problems. NTIS has hired and fired agents, inter-
2 nationally, for what it considered good and sufficient
3 business reasons. To the foreign nationals involved, it
4 appeared to be arbitrary government action on the part of
5 the United States government. There are many peculiar
6 ramifications when the Government actively enters the
7 marketing of information!

8 Government activities cannot be judged solely
9 on a profit-and-loss basis. NTIS appears to be a business
10 venture seeking new opportunities and new capabilities.
11 It must be evaluated, instead, on sound policy reasons.

12 We suggest that this requires that it limit itself
13 to serving information needs not adequately served by
14 citizens themselves. When such activities as it performs
15 become viable economically, NTIS should provide for trans-
16 ferring such economic activities to the private sector-in
17 the public interest.

18 MR. CARY: How would you accomplish that?

19 MR. ZURKOWSKI: Well, there are some examples where
20 it has been done. In the case of NTIS, NTIS has done this
21 on a number of occasions. In one case, involving the patent
22 literature, NTIS had the responsibility for distributing
23 new patent issuances in microfilm, and they had a list
24 of customers, and they had a price, and NTIS put out an
25 RFP to solicit proposals as to how private companies might

Ultimately, the publication of those, in microfilm by NTIS, was taken over by Research Publications -- Sam Friedman, from whom you heard testimony -- without regard to that RFP. He found a source of the documents and began publishing them and indexing them.

MR. CARY: Presumably, they had a reason for wanting to do that -- NTIS -- did they not?

MR. CARY: What was the reason?

MR. URBACH: We felt that we were not able to

adequately satisfy the market, and we felt that the private sector could do a better job.

sector could do a better job.

that you are speaking of

MR. CARY: Would this requirement/involve legislation requiring NTIS to do this; or would you leave it up to their business judgement, or what-have-you?

MR. URBACH: I don't think we are anywhere near recommending legislation in this area. We are suggesting some general policy guidance.

MR. CARY: Okay.

PROFESSOR MILLER: I am having a little difficulty seeing the jurisdictional relevance of some of this.

I don't think it is this Commission's function to grope for a fight between IIA and NTIS. I don't see it as

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1 being relevant to our legislative mandate. I am delighted
2 that we have been informed about NTIS and, in a sense, I am
3 delighted that we have been informed, to some degree,
4 about private industry's reaction to NTIS. But at this
5 point, I think we are being subjected to a lobbying effort
6 which I do not find within our jurisdictional mandate.

7 MR. NIMMER: If I may partially disagree with my
8 respected colleague -- I agree that we should not get
9 into a dog fight between these two entities. But I do think
10 that, ultimately, we are going to be faced with some kind of a
11 policy choice as to whether our recommendations are
12 going to be along -- first of all, of course -- the
13 initial question: Are we going to recommend a clearinghouse
14 approach. And if we do, then is that clearinghouse approach
15 going to be privately oriented--or governmentally oriented.

16 PROFESSOR MILLER: But I do not think that that is
17 a question of whether the government should be in the
18 information vending business, because I take it that, then,
19 we have to consider the future status of the GPO, as well!

20 MR. ZURKOWSKI: Could I address that for just a moment--
21 because I do think that is involved.

22 I think one of the reasons that NTIS has this
23 proposal is that it has created -- as I say -- at considerable
24 cost, an information distribution channel and, as a matter
25 of fact, the material that flows through that channel is

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1 information. It deals in a generic commodity. And what you
2 are seeing here is another effort to reach outside of the
3 Government for additional intellectual property to run
4 through that channel; and all we are saying is that--if
5 you recommend that--from a policy standpoint, you are
6 impacting all of the competitive channels.

7 The clearinghouse mechanism that we are considering
8 within IIA and, jointly, with AAP, would be a payments
9 mechanism that would not operate a document fulfillment ser-
10 vice, itself. And that, if you say that there will be
11 a privileged payments mechanism--that also operates a
12 document fulfillment service at a fixed price--you are
13 creating a monopoly that will say that that is the price;
14 and it will deny the public the advantage of competition
15 between other document fulfillment houses and the emergence
16 of a retail marketplace at which anybody can get a piece
17 of this gigantic infrastructure that everybody talks
18 about, at a retail price.

19 What do you do when you go to a hardware store?

20 You don't worry about the cost to the
21 guy who manufactures all of the stuff that goes into your
22 bathroom when you want a new faucet for your bathtub.
23 You go in and you talk to them about that. And they will
24 advise you about the different choices available; and you
25 pay for a very small piece of it.

1 I think-if you endorse the idea of a Government
2 clearinghouse that is providing the documents, themselves--
3 you are reinforcing those channels of information-marketing;
4 and other parallel private sector channels are going to
5 atrophy. I think that is a policy consideration, for
6 every government agency that touches this thing, to
7 understand that whole thing, and not just to say, "Well,
8 those are beyond our scope."

9 You have to understand that, I think.

10 MR. NIMMER: Paul, the other side of that coin,
11 though: Assuming we agree with your premise that Government
12 should not do that which the private sector can do,
13 suppose the time comes for us to make our recommendations
14 and, as of that time, the private sector is not doing
15 what everyone agrees has to be done--what Mr. Lieb called
16 a universal system.

17 If it is not doing it as of then, how are we to
18 make a decision as to whether it eventually can do it.
19 And, even if we decide that, eventually, it can do it;
20 is that good enough if it is not being done now?

21 MR. ZURKOWSKI: I do think that the fat is in the
22 fire. And I do think that the imminent threat of
23 Government doing it is a goad to the private sector
24 to come up with -- sooner rather than later -- this universal
25 system that you are talking about. My own thought is that

1 the NTIS proposal should be tabled.

2 MR. PERLE: Paul, could you go on and tell us what the IIA
3 has done thus far with respect to clearinghouse procedures?

4
5 MR. ZURKOWSKI: Yes.

6 MR. PERLE: We have heard enough about NTIS for the
7 moment. We understand and appreciate the problem--to the
8 extent that we have jurisdiction.

9 MR. ZURKOWSKI: Okay. Yes.

10 For discussion purposes, we have circulated a very
11 preliminary rough draft of a 3-year plan, and the notion of
12 casting it as a 3-year plan is mine. and is not necessarily
13 endorsed by the IIA. That is a personal proposition that
14 I put forward in order to get the industry to think in long
15 enough terms so as to be able to identify various things
16 which are needed to be done.

17 Now, it is possible to compress all of those things,
18 I expect. I don't think there will be any intention to go
19 at it in a 3-year term. But we are approaching it in
20 much the same way as AAP. We think that where AAP talks
21 about the need to serve the large industrial libraries,
22 we are urging that it also be extended -- the system be
23 extended -- to these document fulfillment houses who, in
24 return for the agreement, would provide the accounting for
25 the amount of use, etc.

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1 We think that there is a test tube area where
2 there would be possible, over a period of time--the
3 gathering of hard data as to how much of this photocopying
4 is going on; of what specific journals; at what impact
5 to the subscription rate, etc.

6 There is a real serious problem with regard to the
7 expensive journals--the costly journals to produce that
8 serve a very small market. It is possible to identify a
9 publication that has a circulation of 120-some subscriptions.
10 The journal has, perhaps, 100 articles a year in it, and
11 sells for \$240.00.

12 Well, if those articles were available -- became
13 known to be available -- on an on-demand basis, there
14 would be some of those 120 who would opt to buy just those
15 articles at \$10 or \$15, or whatever price, rather than
16 to pay the \$240.00 to keep the journal in the library.

17 That is a problem we are trying to address.

18 I think that, toward the last part of this state-
19 ment -- the last half page of page 8 and most of page 9 --
20 we list a number of questions which we would like to ask
21 the Commission's help in dealing with. And I think you will
22 see some of the things that we have encountered in our
23 efforts.

24 1. We would like to see if you could help us determine
25 what steps need to be taken to permit competitors to discuss

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1 cooperation necessary to such a clearinghouse mechanism.

2 MR. NIMMER: Are you talking about antitrust Laws?

3 MR. ZURKOWSKI: Yes.

4 PROFESSOR MILLER: How would you propose that we help
5 you with that?

6 MR. ZURKOWSKI: Well, I am an old staff man, and
7 I have all sorts of ideas about how that might be done.

8 The Commission could constitute a subcommittee and
9 ask for the cooperation, of two or three people in the private
10 sector who are responsible for this, to approach the
11 Justice Department with what the situation is.

12 MR. PERLE: We could even reach a conclusion right
13 now that antitrust relief is needed, and make such a
14 recommendation. We don't have to wait -- I assume.

15 MR. WEDGEWORTH: As a layperson, I would like a
16 better understanding of why you consider this to be necessary
17 if it does not involve standardized payment to any
18 individual publisher, and if it doesn't involve other kinds
19 of exclusive arrangements.

20 MR. ZURKOWSKI: Well, as I understand the problem,
21 it is that when the Information Industry Association, and
22 the AAP, sits down together, any one of those
23 organizations might choose to operate this clearinghouse
24 as a private-for-profit activity. And for those potential
25 competitors to sit down together to agree amongst themselves

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1 that it is in the public interest that there be a non-profit
2 corporation to do the payments debiting and crediting, may
3 restrict and restrain competition among them to perform that
4 function. And I think what we are talking about is clearly
5 a desirable public interest function requiring some clearance.

6 MR. WEDGEWORTH: In other words, there is enough
7 area of gray to make it worthwhile to check it out beforehand.

8 PROFESSOR MILLER: Has the Association done any
9 research on that?

10 Has it reached an antitrust conclusion?

11 MR. ZURKOWSKI: No. No.

12 MR. LIEB: It is my conclusion that it is not so
13 much the vulnerability of the Association which is incidental,
14 and which is there, but it is my conclusion -- and I have
15 considered the matter -- that the publishing houses and the
16 information houses that sit down together and try to work out
17 a system in conformity with the request of Congressional
18 Committees, lay themselves open to a charge of conspiracy.

19 MR. PERLE: Combination conspiracy.

20 MR. LIEB: Under the Sherman Act.

21 PROFESSOR MILLER: I take it you really thought this
22 through?

23 MR. LIEB: Yes. I am very concerned about that.

24 JUDGE FULD: Have you concluded your remarks?
25

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1 MR. ZURKOWSKI: Then, the second point: We would
2 like some help in identifying the kind of author-participation
3 in the operation, of the Dumbarton kind of formula clearing-
4 house that was the subject of Dan Lacy's question at the end.

5 We do think that this is a real problem that could
6 submerge and swamp a clearinghouse! We need some help in
7 exploring the author's position in this situation.

8 Without trying to open up all of those questions
9 that we are going back and forth with --as to: why just a
10 narrow area -- we think it would be useful if there were
11 some formalization --- and we are willing to help out in
12 any of this, but it is our contention that the Commission
13 might wish help -- there were some formalization of
14 a definition of what constitutes scientific, technical,
15 medical, business publications that fall within the area
16 of a clearinghouse kind of activity. It would be useful
17 if there could be some definition agreed upon.

18 MR. PERLE: Are you saying that the clearinghouse
19 should be applicable only to the scientific, technical,
20 medical, and business publications?

21 MR. ZURKOWSKI: No. I am saying that the feeling
22 of our Committee was that this is the area where the after-
23 market is likely to be most identifiable; and I don't want
24 to pre-judge where they are going to come out in the end.
25 But they think that, if there were some categories, it would

1 be more feasible to construct a prototype kind of
2 activity.

3 MR. NIMMER: Isn't your answer to Mr. Perle's
4 question, "Yes." You are thinking -- at least initially --
5 of limiting it to this area? Otherwise, why draw the line?

6 MR. ZURKOWSKI: Well, we are initially thinking
7 about that, but whether that is --

8 MR. NIMMER: That may not be the ultimate.

9 MR. ZURKOWSKI: Right.

10 MR. PERLE: That is short of the universal.

11 MR. LACY: Paul, this is an agreement you are
12 drawing up to provide a license for the clearinghouse.

13 Isn't it for you to decide what your clearinghouse
14 applies to -- not us? It is not for us to tell you what
15 you mean by "scientific, medical". That is your idea.
16 It is up to you to say what you mean by it.

17 MR. ZURKOWSKI: These are just suggestions to
18 the Committee.

19 MR. LACY: Well, we don't know what you mean by it!
20 It is up to you to decide what journals -- what classes of
21 journals -- you are applying to it, and how you are
22 defining those classes.

23 MR. ZURKOWSKI: We are just asking for help in
24 that.

25 MR. NIMMER: I would think that some of us would

1 hope you would not find it necessary to limit it in that way.

2 MR. ZURKOWSKI: Okay.

3 MR. NIMMER: I speak only for myself.

4 MR. ZURKOWSKI: Then, going on to "4", there
5 are document fulfillment practices that are going on today,
6 with recordkeeping and commission practices in-place.

7 There is a statistical gathering function that could
8 be performed to identify precisely what is going on. Again,
9 this is something that an Association could do if it had,
10 in place, a statistical gathering program. We are too
11 young an association to have that. This might be a
12 function that could fall under CONTU's jurisdiction--
13 similar to the study made of library photocopying that
14 King Research is doing.

15 It would provide some hard information about the
16 activities in the marketplace.

17 It is suggested in "5", also, that, as you get
18 into this, there is a vast lack of understanding between
19 even the active participants of this thing as to what the
20 respective roles are. The feeling was that it might be
21 useful if there were some educational pamphlet developed
22 that developed a rather full understanding of how this
23 whole apparatus functions.

24 There were some strong reservations raised about
25 the clearinghouse based on advertising-based publications,

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1 because photocopying of articles in advertising-based
2 publications not only reaches the subscription side of
3 the ledger but it also attacks the subscription base on which
4 the advertising rates are based; and it is a peculiar
5 set of problems.

6 You raised the question of news letters, also, as a
7 different category.

8 I am not sure whether, in "7", then, we suggest
9 the investigation of the cost of the debit/credit accounting
10 procedure which would be required in a Dumbarton-formula
11 clearinghouse. I am not sure that King Research is dealing
12 with that; and there are a number of models around.

13 And, finally, there is the need to survey publisher
14 attitudes towards blanket-permission requests that will
15 start coming in about June of this year, in the absence of a
16 clearinghouse payments formula.

17 The idea is to determine if what is sought to be
18 done for all in the clearinghouse program can be done
19 as well, bilaterally.

20 I am not sure that any or all of these have any
21 appeal to you, particularly. But it does suggest some of the
22 areas where we need additional information as we get into
23 this program.

24 MR. PERLE: I am having a tremendous amount of
25 difficulty with this, Paul. I really am!

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1 It seems to me that notwithstanding Senator
2 McClellan's letter of request to this Commission, we have
3 a statutory charge and a statutory limitation on our
4 activities. We have to make recommendations as to legisla-
5 tion; and it starts to sound more and more to me as though
6 our recommendation in dealing with the replication area
7 has to be something along the lines of, "Okay. There has
8 to be Anti-Trust exemption that ought to come along pretty
9 soon, I guess, to allow the implementation of the clearinghouse".

10 And then, depending on what has happened between
11 now and the time of our report, we have to say one of several
12 things:

13 First, that there exists a mechanism which allows
14 for compensation of proprietors, and ready access, or: No!
15 It doesn't exist, so adopt some sort of compulsory license --
16 compulsory mechanism. Or, the Government, itself, should
17 set up a clearinghouse.

18 Now, it seems to me that we cannot implement the
19 clearinghouse. You are asking us, in this series of
20 questions, to implement your clearinghouse. I don't think
21 that is our job!

22 MR. ZURKOWSKI: I don't think we are asking that
23 at all, Gabe! I think what we are asking is for the
24 Government to do what we think is good social policy.
25 We are asking the Government for assistance in helping citizens

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1 do what they are able to do. And we have a very short time
2 frame, where we are not saying you have to endorse any of
3 this. We are saying: These are some of the problems that
4 we are encountering and, if it is the sense of the Commission
5 that a clearinghouse apparatus should be in place, and you know
6 that the citizens are exploring that. We are asking for what-
7 ever assistance you can provide us in facilitating that.

8 MR. PERLE: Paul, it seems to me that, if you
9 are setting up a private organization to get your antitrust
10 exemption, you don't have to justify it with empirical
11 evidence.

12 All you have to do is set up a clearinghouse, and
13 that is why I think you are asking us for stuff that is not
14 necessary. You know that it is necessary to have some
15 royalty licensing arrangement; and you don't have to justify
16 that in any way, shape, or form. All you have to do is
17 set up a mechanism.

18 And I suggest that the IIA, the AAP, and the other
19 interested parties have to get to work in establishing a
20 clearinghouse and let this Commission know what you are doing!
21 I don't think we can be a research arm for you guys; and I
22 don't think we should be! That is what you are asking us to
23 do.

24 We have heard -- those of us who have been banging
25 around copyright law revision -- about a clearinghouse for

1 twenty years, at least! Certainly since 1964. That is
2 twelve years. Nothing has ever happened! And I suggest
3 that, before this Commission is over with, if nothing does
4 happen in the way of implementation of some sort of private
5 clearinghouse mechanism by the private sector, then this
6 Commission has some other recommendations that it is going
7 to have to make to the Congress.

8 MR. NIMMER: I endorse that!

9 Let me add the aspect that I asked Mr. Lieb
10 about - - namely, the unsupervised machines. That
11 seems to be left out of the universe.

12 Maybe, as Mr. Weil suggested, it is insignificant.
13 I am not sure, at all, that it is insignificant. Even if it
14 is, now, he is suggesting that he did not say that it is
15 insignificant. At any rate, whether or not it is insigni-
16 ficant now, it may not be insignificant once there are
17 effective controls for the supervised machines and, unless
18 that is handled in some way, that, in itself, may require
19 us to think of legislation which we would not have to think
20 of if there were an effective, going clearinghouse
21 for the supervised machines.

22 What about that area?

23 Have you given thought to that?

24 MR. ZURKOWSKI: Yes, I have and, unfortunately,
25 the Committee really has not come to firm grips with this.

1 But it has been laid out, and there has not been a great
2 deal of disagreement with it, and that is that the clearing-
3 house -- the payments clearinghouse -- would essentially
4 have three functions:

5 It would administer this debit and credit --
6 the activities.

7 There would be a sales force that would be present
8 in the marketplace to contact places, just like the ASCAP
9 sales force is out contacting the juke mills to sell blanket
10 licenses, to assure that most of the people were playing
11 by the same rules because the object is to get that retail
12 price down to the minimum cost to the end consumer.

13 And there would be a contractual division -- a
14 legal division -- that would be responsible for contract/
15 license arrangements and enforcement.

16 There is always going to be a hole in the sock
17 of Copyright!

18 MR. NIMMER: How big a hole?

19 MR. ZURKOWSKI: Well, I think that is for
20 experience to develop. I think that there will be large
21 gaping holes that affect the marketplace structure. And
22 those will be closed over time, but it is not something
23 that you are immediately going to be able to legislate
24 against -- I don't think.

25 MR. LACY: Just commenting on that point: I think

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1 that you may have a situation in which a given operator of
2 copying equipment -- a library for example, but it might
3 kinds of
4 be any one of a number of other/institutions or persons --
5 might get a license to make photocopies by contracting with
6 such a clearinghouse, or, conceivably, it might be able to
7 get a license by making certain undertakings that would be
8 prescribed by Statute under some blanket, legally imposed
9 compulsory license arrangement. What we end up with is
10 that the operator of the copying machine who has not availed
11 himself of a license by one of these ways--if he does copying
12 beyond fair use--does it at his peril and, from then on, it
13 becomes simply an enforcement and a policing problem.

14 MR. NIMMER: Again, if I may respond to that: Under
15 the existing law and the new law, that raises, in a sense,
16 the Sony problem. That is, is the operator of the
17 machine liable if customers engage in copyright infringement?

18 If the operator of the machine is not liable--
19 particularly with the notice, "Do not use this machine
20 for copyright infringement", then you may ---- under the
21 existing structure, and under the proposed new law --
22 you may have to be able to hold the operator of the machine.

23 MR. LACY: I think that is a question of defining
24 who is the infringer--which is a significant one. It is anala-
25 gous to laws against murder. We have licenses under which
you can get permission to kill somebody, as in Utah, now,

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1 by going through carefully supervised Court procedures to
2 do it. If you kill somebody without getting a license,
3 by law and the Courts and the Utah State prison, you do it
4 at your "own peril" unless it is fair use -- i.e.,
5 self defense.

6
7 But it is a very considerable policing problem to
8 keep people without a license from going around killing
9 people.

10 MR. ZURKOWSKI: I have one other thing that I
11 discussed last night at NSF. There are some people over
12 there who are talking about the idea of individual licenses,
13 which threw me through the roof when I first heard it. But
14 it has some interesting wrinkles to it-in that it would
15 deal completely with the question that Mr. Wedgeworth was
16 raising about the student, because the student would have
17 an individual photocopying license as part of his school
18 function -- as part of his student status.

19 If I were interested in photocopying Popular
20 Mechanics materials, I would get a Class 5 photocopying
21 license for myself, and I could photocopy that material.

22 You could get to the point where it would --
23 according to this chap -- be fringe benefits that employers
24 would provide employees. The lid has been lifted on this
25 box, I think.

1 JUDGE FULD: Ms. Wilcox?

2 MS. WILCOX: I was delighted to read your second
3 paragraph on page three. That indicates that you have some
4 statistical data available that would be useful to the
5 Commission.

6 I wonder if you could provide us with some kind of
7 information about who the subscribers of data bases are--
8 and what the holdings of libraries are-- so that they
9 can correlate that, to know who most of the subscribers
10 are, and what the available materials are in the libraries.

11 MR. ZURKOWSKI: Say that again?

12 I am not sure --

13 MS. WILCOX: You suggest that most of the
14 the
15 users of the computer printouts ask for/documents-- even
16 though it is available in their own library.

17 I wonder: You must have the statistical data
18 to substantiate that. It would be very useful for this
19 Commission to have that.

20 MR. ZURKOWSKI: We do not have statistical
21 information. That is the practice that has been reported
22 to us.

23 MS. WILCOX: I just wondered if you could provide us
24 with who presented that view.

25 JUDGE FULD: Who supported that view?

MR. ZURKOWSKI: Well, I have not set up a

1 statistical gathering program here that would protect the
2 proprietary interest of those companies. I do not have
3 those statistics; and until there are some statistics --

4 MS. WILCOX: Who supported the view that most
5 of that material was available to the user of the
6 library? It indicates you know who the user is--and what
7 the holding of the library is.

8 MR. LACY: I remember, out at Los Angeles at
9 a meeting we had, there was some testimony which certainly
10 did not give us any hard, statistical figures. It painted
11 a qualitative, rather than a quantitative, picture of the
12 situation--from one of the information-on-demand companies.
13 It pointed out that a large part of their business--and
14 the common practice--was for a research institute --
15 frequently a university that had gotten a grant, say, from
16 the National Institute of Health, or the National Science
17 Foundation, to do research on a particular subject -- simply
18 routinely -- either directly or through such an information
19 broker -- got a computer printout of all of the articles
20 that the data bases had access to and provided and --
21 to save time and trouble -- without any investigation as to
22 the availability of files or journals. The institute turned
23 that over to the information broker to assemble into a
24 complete collection of copies of what might prove to be
25 relevant documents, which they then house in the project head-

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1 quarters. I would think that "common knowledge" would suggest
2 that that is a common and growing practice. Probably
3 nobody knows how many of those articles are available in
4 the institution, because they don't really care whether
5 it is or is not. They want a copy, there on the project
6 site. They don't want to go to the trouble of finding
7 out whether it is available, or whether it is not available.
8 There is plenty of Federal money available to do this, so:
9 why go to all that trouble?

10 MR. ZURKOWSKI: That would be a good point to
11 investigate, because I think that is the crux of the proposition
12 that there is an after-market. The initial subscription to
13 a publication winds up in the library, and then you have a
14 researcher who, six months later, wants a copy of that,
15 and he gets it from another source.

16 It is a kind of revenue-generating activity
17 for publishers of journals.

18 MR. LACY: Which it is now?

19 MR. ZURKOWSKI: Which it is now, yes.

20 MS. WILCOX: I am only suggesting that if the
21 statistics are available, they would be very useful.

22 MR. LACY: You would probably have to get a
23 Fifth Amendment exemption for some of the information
24 brokers that do this--before you can get this!

25 MS. WILCOX: Then we should be careful of the

assumptions that we make.

MR. ZURKOWSKI: It is a good point, though.

MR. PERLE: May I ask you the same question that I asked Charles?

Could the IIA let us know, in the area of photocopying reprography, what changes if any there ought to be in the Copyright Law of 1976, and why?

MR. ZURKOWSKI: I have already made a note of that. I will do what I can to get you something. We are hopeful of being able to have something concrete and specific for your consideration at your March hearings.

MR. PERLE: It may very well be that you will come up with saying that we "don't need changes in the law but we do need some guidance, and the Courts need some guidance on the interpretation of the law and perhaps the report of the Commission would be of some help there."

JUDGE FULD: Does that conclude your remarks?

MR. ZURKOWSKI: Yes.

JUDGE FULD: Thank you very much.

The Commission will recess until 2:00 o'clock.

(Whereupon, at 12:05 o'clock, p.m., the meeting was recessed until 2:00 o'clock, p.m., on the same day.)

-o0o-

- AFTERNOON SESSION -

1
2 JUDGE FULD: Before we listen to our next speaker,
3 will you take up the matter we were discussing?

4 MR. LEVINE: Yes. The Commission has been interested
5 in receiving the viewpoints of interested Consumer and other
6 related types of organizations as to the work that the Commission
7 is involved in, in the task that Congress has assigned to it.

8 Toward that end, the Staff has gone forward and
9 discussed with various organizations the possibility of their
10 providing -- the Consumer organizations -- the possibility of
11 their providing that kind of input to the Commission, and I
12 believe the Commission has a motion.

13 MR. LACY: Mr.Chairman, I move that the Executive
14 Director, with the approval of the Chairman of the Commission,
15 and with the advice of a Subcommittee to be appointed, be
16 authorized to contract with an appropriate organization or
17 organizations to study and analyze the interests of consumers
18 and related groups with respect to matters within the juris-
19 diction of the Commission, who have not presented their views
20 to the Commission, and to report their findings;with a
21 contract providing funds to the organization performing the
22 necessary studies.

23 MR. NIMMER: Second.

24 JUDGE FULD: You have heard the motion and it has
25 been seconded.

1 All in favor, please raise your hands?

2 (Unanimous show of hands)

3 JUDGE FULD: Those opposed?

4 (None)

5 JUDGE FULD: It is unanimous. I will suggest--
6 for the Subcommittee; Ms. Karpatkin, Professor Miller, and
7 Mr. Hersey.

8 Our final speaker today is Irwin Karp, Counsel
9 for the Authors' League of America and its two affiliated
10 organizations: the Authors' Guild and the Dramatists'
11 Guild.

12 The Commission is happy to have you with us,
13 Mr. Karp.

14 STATEMENT OF IRWIN KARP, ESQ.,
15 AUTHORS' LEAGUE OF AMERICA
16 -on-
17 RECOMMENDATIONS, OF AUTHORS'
18 LEAGUE, ON PHOTOCOPYING

19 MR. KARP: Thank you, Mr. Chairman.

20 In November, I had mentioned to Members of the
21 Commission Staff that the Authors League intended to write
22 to the Executive Director asking what further action CONTU
23 contemplated on various aspects of machine reproduction of
24 journal articles, contribution books, and other literary
25 works.

We intended, in our letter, to refer to some
possible subjects for action.

1 It was then suggested that--instead of writing--
2 that we appear before the Commission to discuss these
3 matters; and I accepted that kind invitation.

4 On a day like this, I thought I better explain that
5 I did not force myself upon you. I don't want to be blamed
6 for holding you in, in this snow storm -- although it is
7 not raining.

8 One of the reasons that prompted the Authors
9 League to consider communicating with the Commission and, of
10 course, testifying today was, first, to suggest some areas
11 in which further action seems to be required of the parties
12 and, at least in some instances, the Commission.

13 Next: So that the Authors League, the
14 Association of American Publishers, and the Library
15 Associations might be informed as to whether CONTU plans
16 action on these subjects and, if so, what types of action.
17 And, if it does, the Authors League -- and I assume other
18 organizations -- would like to express their views and par-
19 ticipate in the process.

20 Finally, if CONTU does not plan an action on
21 particular subjects, that ~~is a factor~~ that our organization
22 and others -- with publishers and librarians -- would probably
23 have to consider in planning further programs and action
24 of our own.

25 I do not, of course, expect that the Commission

1 would respond, to the discussion which follows, immediately--
2 but it would be helpful for us to know in the near future,
3 since January 1, 1978 is only a scant twelve months away.

4 These are some of the possible subjects which we
5 wanted to place before the Commission and, in respect to
6 which, we made this inquiry:

7 First of all, the heading: Additional Guidelines
8 for Various Provisions of Section 108(g).

9 The Senate Judiciary Report on the Revision
10 Bill urged the parties -- Authors', Publishers', and
11 Librarians' organizations -- to formulate photocopying
12 guidelines to assist library patrons and employees
13 in complying with Section 108.

14 Thus far, guidelines have been formulated for
15 one aspect of the interlibrary arrangements' proviso of
16 (g) (2) -- the last proviso.

17 These guidelines, as you well know, deal with
18 the aggregate-quantities-criteria for interlibrary copying
19 of journal articles less than five years old, and fiction,
20 poetry, and other material described in Section 108(d).

21 If Authors' Publishers' and Librarians'
22 organizations are to comply with the Judiciary Committee's
23 request, then the Authors' League, Association of American
24 Publishers, the American Library Association, the Associa-
25 tion of Research Libraries, special library associations

1 interested
2 and other/groups should soon be turning their attention
3 to guidelines for other provisions of Section 108(g)--
4 and other provisions of Section 108 in its entirety.

5 First of all, Section 108(g)(2): The next
6 logical step, would seem to be to complete those guidelines
7 for the remainder of the Interlibrary Arrangements Proviso.

8 First: To define "aggregate quantities", as the
9 term appears in that proviso, with respect to journal
10 articles more than five years old.

11 Second: To define "aggregate quantities" and make
12 other provisions, if needed, for in-house library reproduction,
13 copies of journal articles; and other literary material,
14 including contributions and small parts of copyrighted
15 works.

16 It would be useful to know if CONTU plans any
17 participation in the formulation of these guidelines and,
18 if so, what type of participation is anticipated.

19 Next is Section 108(g)(1). This is also a
20 likely candidate for guidelines. Section 108(g)(1)
21 prohibits library reproduction or distribution under
22 any Subsection of 108, as distinguished from (g)(2), which
23 only deals with Subsection (d):

24 "Where the library, or its employees, is aware,
25 or has substantial reason to believe that it is engaging in
related or concerted reproduction or distribution of

1 multiple copying of the same material made on one occasion,
2 or over a period of time."

3 It may be that libraries and their employees
4 do not require the guidance of guidelines and believe that
5 the Senate Reports recommendations that these be developed
6 are not appropriate for 108(g)(1). However, guidelines may
7 be useful or desired by them. Authors League is prepared
8 to participate in their formulation, along with library
9 organizations and publisher organizations.

10 Particularly since the multiple copying which
11 (g)(1) prohibits, is likely to weigh heavily on fiction,
12 poetry, essays, and other non-scientific materials, it
13 again would be helpful for the Authors League and other
14 organizations to know if CONTU plans any action on this
15 topic and, if so, what action.

16 Guidelines may also be useful for other provisions
17 of Section 108. For example, to spell out the meaning
18 of "reasonable effort", and "fair price" under Section
19 108(c), which deals with single copy reproduction to replace
20 a lost, stolen, or damaged copy.

21 Guidelines may also be useful to provide guidance
22 for libraries and their employees on the "reasonable
23 investigation", "fair price", and other requirements of
24 Section 108(e)--which deals with single copy reproduction of
25 an out-of-print work.

1 The same question, of course, arises as to what
2 plans CONTU may develop, if any, for action in the formulation
3 of such guidelines.

4 I should stress that the Authors League is
5 prepared to comply with the Senate Judiciaries' recommendation
6 that it work with publishers and library organizations
7 to formulate such guidelines, and it will be happy to
8 cooperate with CONTU, if it decides to participate in
9 these efforts.

10 Next: I think that some attention should be
11 paid to the problem of coin-operated machines.

12 Public Law 93-573 mandates the Commission, in
13 Section 201(b), to study and compile data on the reproduction
14 and use of copyrighted works of authorship by various
15 forms of machine reproduction and then, in the following
16 subsection, requires the Commission to "make recommendations
17 as to such changes in the Copyright Law of procedures that
18 may be necessary to assure, for such purposes, access to
19 copyrighted works, and to provide recognition of the rights
20 of copyright owners."

21 "Recognition of the rights of copyright owners"
22 includes, in our view, payment for use when the use exceeds
23 fair use; or exceeds the limitations on rights contained
24 in Section 108.

25 One of the most extensive means of machine re-

1 production of copyrighted works is the coin-operated copying
2 machine. We understand that the Commission has heard some
3 testimony on technological developments in this area. We
4 believe the Commission should study and compile data on coin-
5 operated machines and their reproduction of copyrighted
6 works; and we believe the Commission should make recommenda-
7 tions to Congress for changes in the 1976 Copyright Act
8 that will provide recognition of the rights of copyright
9 owners. That is; compensation for authors, where reproduction
10 exceeds the limit of fair use, or the limits of Section
11 108.

12 The solution may take the form of legislation
13 requiring owners or operators of these machines to pay a
14 percentage of their income to copyright proprietors,
15 with a clearinghouse system to distribute income on formulas
16 based on sampling of copies; or technology might permit more
17 precise accounting for copying transactions that exceed
18 these statutory limits, while legislation might require
19 institutions that maintain coin operated machines, in
20 facilities where there is a substantial volume of copyrighted
21 works, to supervise and to collect fees.

22 The Authors League is not proposing any
23 specific solution to the Commission at this point. What we
24 are doing is recommending that the Commission study and
25 compile data on the coin-operated machine reproduction of

1 copyrighted works, so that it can recommend--and we
2 urge that it recommend--changes in the Copyright Act that
3 would provide compensation to copyright proprietors.

4 The Authors League would, of course, like to be
5 heard by the Commission--when it turns its attention to this--
6 promptly.

7 Next: Workable copyright clearance and licensing
8 procedures.

9 The Senate Judiciary Committee also recommended in
10 its Report that representatives of authors, publishers,
11 and librarians join together to develop workable clearance
12 and licensing procedures for photocopying that exceeds the
13 limits permitted by Section 108, and by the limits of
14 fair use.

15 In a letter to the Chairman of the Commission
16 in May, Chairman McClellan said:

17 Senate Report 94-473, in its analysis of
18 Section 108, states in part:

19 Concerning library photocopying practices
20 not authorized by this legislation, the
21 Committee recommends that workable clearance
22 and licensing procedures be developed. I
23 believe that it is important that there be
24 no disruption in the use of copyrighted
25 materials by the patrons of libraries, following

1 the coming into effect of S-22, because of
2 the absence of appropriate clearance and licensing
3 procedures, for the types of photocopying
4 practices not included within the Exemption of
5 S-22. I therefore request, in accordance with
6 the recommendation of the Senate Committee on
7 the Judiciary, that the Commission, in conjunction
8 with the formulation of guidelines, take
9 appropriate initiatives in coordinating the
10 establishment of necessary clearance and
11 licensing mechanisms.

12 The Authors League recognizes that some work
13 has been instituted, such as the King study. We believe
14 the Commission should consider whether it might take further
15 action. For one thing, the King study will focus on a
16 transaction-based mechanism for paying royalties on
17 library photocopying of copyrighted serial publications.

18 Previous discussions have indicated interest
19 in alternate mechanisms, other than transaction-based,
20 for various types of copying, of various types of material,
21 by various types of users.

22 For example, a schedule of fees added to sub-
23 scription prices; or different forms of blanket fee
24 arrangements, depending on the volume of copying.

25 Moreover, much systematic and/or multiple copying

1 of copyrighted works is done by libraries maintained by
2 business corporations and other users, where alternate
3 clearance and licensing methods might be feasible, and
4 probably will have to be instituted soon after the Bill
5 takes effect.-- I would assume right at the time that the
6 Bill takes effect,--if these libraries are to be able to
7 continue engaging in the type of copying which they,
8 themselves, concede exceeds the limits of Section 108.

9 Much copying which will require licensing will
10 involve works other than serial publications. Obviously,
11 the Authors League believes that workable clearance and
12 licensing systems must be available for reproduction of
13 fiction, poetry, and other non-scientific works, and must
14 be able to provide adequate data which will permit
15 distribution of fees to authors who are legally entitled
16 to payment under the Copyright Law; and under their
17 contractual arrangements with publishers.

18 It seems likely that further studies will be
19 required.

20 Moreover, the Commission -- or another Agency --
21 can serve as a communication center which could
22 accumulate and distribute to all interested parties,
23 information on proposals, plans, and even current
24 arrangements for clearance and licensing, which are being
25 formulated, or being applied by individual publishers,

1 learned societies, and other organizations or groups of
2 organizations, both here and abroad.

3 In addition, the Commission could, under Section
4 207(b) of its charter, convene seminars and conferences
5 to provide a more open forum for discussion of clearance
6 and licensing arrangements. This is a multi-faceted subject
7 that cannot be dealt with by adopting a single, over-all
8 solution. Certainly not at this stage of the art! And
9 professional authors who have a financial stake in fees
10 paid for reproduction of their works copied from journals,
11 collective works, or books, will not be satisfied with
12 a system that serves only the interests of technical and
13 scientific publishers, and the particular library community
14 which they serve.

15 The next topic I would like to suggest deserves
16 some attention and some indication of the Commission's
17 plans: It is the Auditing of Guidelines.

18 The 1976 Copyright Act requires the Register
19 to consult with representatives of authors, publishers, and
20 periodical publishers and librarians, and report to the
21 Congress on the extent to which Section 108 has achieved
22 the necessary balancing of the rights of creators, and needs
23 of users, to describe any problems that have arisen, and to
24 present legislative or other recommendations, if warranted.
25

Moreover, the final section of your Interlibrary Guidelines for Section 108(g)(2) provides that they will be reviewed within five years as part of that statutory review called for by Section 108(i).

The review process, including review of the guidelines, would be facilitated if the Commission conducted periodic surveys or audits of the guidelines -- the formulated guidelines -- for the Interlibrary Proviso -- the Library Arrangements Proviso, I should say -- and other Section 108 guidelines which are formulated, either by the Commission in conjunction with interested parties, or by the parties themselves.

Review and sampling of library records of copying transactions maintained pursuant to the guidelines will provide information that will be helpful in determining their efficacy; and so, too, would periodic inspection of the practices of fulfilling and ordering libraries, to consider such subjects as whether records are being kept, and whether records are adequate, and whether the records will help serve the purposes of the guidelines.

The Commission has necessary power to obtain this information and data, and it would be useful, also, to determine what review and audit procedures would be adopted -- whether the Commission or the Copyright Office undertake such work, or private industry.

This concludes the subjects which came, fleetingly
to our mind, as we turned our attention to this problem.
I think there are probably others that we would recommend
to the Commission; but we seriously urge that some indication
be given -- as I say, fairly soon -- of which of these areas
-- especially in connection with other guidelines -- the
Commission may plan action on, so that we can guide our-
selves accordingly.

I think that the Senate Committee will be inquiring
of us shortly -- and when I say "us", I don't
mean the Authors League; I mean the League; AAP, the
American Library Association, and others -- as to what
progress has been made in complying with its suggestions.
And I think that our interests -- the interests of authors,
publishers, and librarians -- would be served if we can move
forward in complying with this request.

Thank you.

MR. NIMMER: First,--parenthetically,--about the
guidelines: My own feeling -- and maybe that of CONTU --
is that the significance of filling in the gaps in the
guidelines and otherwise further interpreting the
statutory language in the form of guidelines,--whether
or not that is significant or not, or how important it is,--
will turn to a degree on what the rest of our recommendations
are. It may be that they may not have as great signifi-
cance. Anyway, that remains to be seen.

1 I have a few specific questions, Mr. Karp.

2 First, do you-or does the Authors League-have
3 any position or thoughts -- assuming a clearinghouse system
4 is established -- on the relative desirability of a privately
5 constituted clearinghouse, or a Government instituted
6 clearinghouse?

7 MR. KARP: For granting copying permissions?

8 MR. NIMMER: Yes.

9 MR. KARP: We would prefer a privately-operated
10 clearinghouse.

11 MR. NIMMER: Assuming you prefer it in principle,
12 do you also see it as sufficiently likely to be an
13 operating entity so that it is not merely a choice of an
14 abstract proposition but of a reality as against the possible
15 reality of a Government clearinghouse?

16 MR. KARP: I think a privately-operated clearing-
17 house is more of a reality--has more possibility of reality--
18 than a Government-operated clearinghouse; based on our
19 experience in many other areas. Aside from the shop-
20 worn example of ASCAP -- which probably may not be that
21 pertinent an example -- there are, as you know, privately-
22 operated licensing organizations that have licensed, on an
23 annual basis, thousands of permissions for the performance
24 of plays, for example. They have been operating since before the
25 turn of the century. There are three or four of them. There

1 is the Music Publishers entity which licenses the
2 production of records under the Copyright Act, and
3 others.

4 MR. NIMMER: One of the problems, of course, is
5 -- as it has been described -- "universality." That is,
6 whatever entity or entities there are, the desirability that
7 they represent essentially all copyright owners whose
8 works it may be desired to copy. In the case of these
9 existing ones, I suppose it is largely true. I am not sure
10 whether it is true in the playwright area.

11 MR. KARP: On the contrary, there are four or
12 five competing organizations.

13 MR. NIMMER: Out of all of them, can you, essentially,
14 get any play that you want?

15 MR. KARP: Yes -- and a lot of plays you don't
16 want!

17
18 MR. KARP: No. As you know, there is not only
19 Samuel French. There is Dramatists Play Service, which
20 was deliberately created to provide -- I hate the ugly
21 word "competition" -- competition for French--and has
22 succeeded in doing that. There is an organization in
23 Chicago which does a lot of licensing of rights.
24 There are several organizations, privately operated, that
25 license dramatic and musical works -- Whitmark and

1 others.

2 MR. NIMMER: Is it your view that the price --
3 assuming some effective form of clearing house -- to be
4 charged should be determined strictly in the marketplace
5 without any kind of governmental intervention?

6 MR. KARP: I think it can be. I think it would
7 be preferable.

8 MS. WILCOX: How would the marketplace operate,
9 under such circumstances?

10 MR. KARP: Well, if you have competition, it can
11 operate by the usual method of making choices.

12 MR. NIMMER: But "competition", here, meaning
13 competition like ASCAP and BMI and SESAC, together,
14 representing all of the songwriters; but there is only
15 competition as between those three -- not between all of
16 the songwriters.

17 Would that be the kind of competition you are
18 talking about here?

19 MR. KARP: No! I am talking about competition in
20 other areas, where there is a higher degree, and whereas here,
21 it does not necessarily follow that every particular publica-
22 tion is so essential that it cannot be replaced by something
23 else.

24 If you will only focus on the one copying trans-
25 action, the one journal, at one time, you are dealing in an

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1 area where it may be difficult to conceive interplay of compe-
2 titive forces but, over a period of time, I think, as
3 licensing develops, the journal which over-prices itself
4 is the journal which will soon go out of business.

5 MR. NIMMER: Just a couple more questions, Mr.

6 Chairman:

7 You mentioned our considering alternative forms of
8 payment,--other than transaction-based formula. You suggested
9 a couple of possibilities.

10 Were you implying that you, or the Authors League,
11 might prefer some basis other than a transaction base?

12 MR. KARP: No. I actually believe that, for
13 literary works, the transaction-based formula can work
14 and it would be fair for authors -- more fair.

15 I am trying to work my way out of that grammatical
16 problem of "more fair".

17 That is partly because each author who makes the
18 usual type of arrangement has a direct financial stake
19 in this, as well as in other subsidiary publishing rights.
20 In other areas, in the case of technical publishing, where
21 the primary economic interest is only that of a publisher,
22 it may well be that the blanket licensing arrangement of
23 some sort, or a fee schedule, could work and satisfy the
24 publisher as certain publishers have, in the recent past,
25 expressed that view and, for them, that might work better.

1 MR. NIMMER: I guess my last question is with respect
2 to the coin-operated machine. This is something we are
3 turning our focus on, and are very concerned with. I think
4 we would be interested to hear any further enlargement of
5 your views on how that can be effectively brought within
6 legal confines.

7 MR. KARP: I would prefer not to, only for this
8 reason:

9 I indicated some general thoughts on it.

10 I think in the past we have seen that, when
11 people talk too loosely on the eve -- hopefully on the
12 eve -- of sitting down to serious discussion, the rambling
13 thoughts have a way of inhibiting discussion in the future.
14 I would be glad -- if you are turning to this -- to submit a
15 more precise and carefully formulated statement of views
16 on it.

17 MR. NIMMER: We would, indeed, like that!

18 MR. KARP: In turn, of course, we have to know
19 a little more -- this is a chicken-and-egg situation --
20 of the economic data involved, so that we can take that
21 into account.

22 MR. WEDGEWORTH: Mr. Karp, I would like to hear
23 a bit more about your recommendation about auditing of
24 guidelines. I am not sure that I understand that, in
25 the context of CONTU's work, and prior to the operation of

1 Section 108(i).

2 Are you saying that the guidelines -- we should
3 consider modifications to the guidelines prior to the
4 five years?

5 MR. KARP: No. If I said it, I certainly did
6 not mean to convey that.

7 MR. WEDGEWORTH: I don't think I completely
8 understood you.

9 MR. KARP: What I said was that within five years
10 -- I think the language of the Statute is "no more than
11 five years from the date of enactment * * *".

12 MR. WEDGEWORTH: Yes.

13 MR. KARP: "The Register of Copyright shall report
14 to Congress on the application of Section 108 and advise
15 Congress on how it has thus far served the rights of
16 authors and the need of users." And I then mentioned
17 your guidelines, themselves, and the statement
18 that they should be reviewed after five years, or within
19 five years.

20 What I was suggesting was that a review by the
21 Register at the end of five years -- a report to Congress
22 at that point -- could hardly be made unless some prepara-
23 tion had first been undertaken, and that the auditing of
24 guidelines between January 1, 1978 and January 1, 1983
25 would enable the Register to perform that function. Also,

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1 since you are the author of this one set of guidelines,
2 it seemed to us at least worth suggesting that the
3 Commission participate in that process -- the Commission
4 happening to have powers that the Register does not have,
5 including the power of subpoena.

6 MR. WEDGEWORTH: So you are simply saying that
7 we ought to start planning for that review process ahead
8 of time.

9 MR. KARP: Yes, and initiating it ahead of time.

10 MR. PERLE: Irwin, we have asked this question
11 of other people. Let me ask it of you -- not for your
12 response right now.

13 We have not heard enough from the Authors. We
14 have not had enough testimony from them.

15 So that we can fulfill our Statutory charge, could
16 we get, from the Authors League, a statement -- either oral
17 or written -- of what deficiencies from the Authors'
18 standpoint there are in the Copyright Law of 1976; in the
19 photocopying field; and what changes there should be and
20 why, in their view and whether they be in the law or in
21 the procedures for the interpretation of it, for our
22 guidance.

23 MR. KARP: We will be glad to submit such a
24 statement.

25 MR. LEVINE: As our Statute now reads, the

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1 Commission goes out of existence on virtually the day that
2 the new Act comes into effect. So there might be some
3 very practical difficulties in the Commission auditing
4 guidelines that have not even begun to become operative
5 when we are no longer in existence.

6 You mentioned, Mr. Karp, the licensing of
7 mechanical rights in recordings: that there is a collection
8 agency for that. That is done in the context of
9 compulsory licensing under the Statute. I think I know
10 your position on this.

11 Do you want to say anything about compulsory
12 licensing?

13 MR. KARP: Well, the Music Publishers Agency -- the
14 Harry Fox Agency -- does not grant compulsory licenses.
15 In other words, the compulsory licensing of records. --
16 which is, of course, an abomination -- imposes a
17 ceiling. All of these transactions are voluntary
18 transactions, at rates below the ceiling.

19 The only effect of the mechanical royalty
20 compulsory licensing provision is to price-fix a maximum
21 for the benefit of record companies, and several of us
22 have felt that one of the great weaknesses of the Revision
23 Bill was that it maintained that inequity. But the
24 Agency, itself, bargains. That is incorrect when I
25 say that! The Agency does not bargain! The Agency

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1 acts as a clearinghouse which receives requests for
2 permissions from record companies; funnels them to the
3 copyright owner, and then takes back the copyright owner's
4 proposal for a fee -- all of which is done, sometimes, in
5 ten minutes on the telephone, and which works out in a
6 pattern-as most operations of this sort do--into just
7 two or three prices, depending on the types of work.
8 But that is a voluntary license -- purely voluntary
9 licensing system.

10 I think the mechanical royalty rate is a good
11 example of what is wrong with compulsory licensing.

12 Another thing that is wrong with compulsory
13 licensing will, I think, develop out of the bitter
14 experience of the Tribunal. As the Tribunal sits down
15 to the thankless task of reviewing--or trying to revise
16 the rates for juke boxes, records, cable, and the public
17 television uses of music--it will get itself into the worst
18 sort of Public-Utility rate-making harrassment conceivable!

19 Somebody is going to be hurt one way or another/and
20 in almost every one of those,
21 than
22 probably much more so/if the parties had bargained voluntarily.

23 In some cases, users will pay more; in some cases,
24 copyright owners will get less; it will be much more
25 expensive; and it will take much more time. Its only
26 advantage is that it will provide jobs for members of the
27 Tribunal, and the Staff.

1 MR. CARY: Irwin, as I heard you, I thought you
2 said that, in the Music field, all of these licenses are
3 negotiated. I think, for the record, that it should be
4 stated that -- it is my understanding -- a large number
5 of them are, but there are some that are operative under
6 the Compulsory Licensing Information Act.

7 MR. KARP: Yes, that is true.

8 MR. CARY: I wanted to make that clear.

9 MR. KARP: I did not mean to suggest that there
10 was a unanimous procedure.

11 MR. CARY: Maybe I heard you incorrectly.

12 MR. LACY: Mr. Chairman --

13 JUDGE FULD: Yes.

14 MR. LACY: I have a couple of questions I want to
15 ask Mr. Karp.

16 One is the question of the desire of the Authors
17 League to explore setting up a form of voluntary clearing-
18 house which this Commission was urged, by Senator McClellan,
19 to encourage and facilitate.

20 Do you feel there are any antitrust considerations
21 those discussions at
22 entering into /this stage; and do you feel the need for re-
23 assurance at this point?

24 MR. KARP: No.

25 MR. LACY: Not everybody shares that viewpoint!

MR. KARP: You asked me what I thought!

1
2 MR. KARP: I know that other people do.

3 MR. LACY: The other point relates to 201(c).
4 If you remember, that is the provision about the rights
5 in collective works.

6 As I understand it, the intention was simply
7 to put in the Statute what was essentially case law, but,
8 perhaps, to do it more absolutely than was the status of the
9 case law.

10 This says, among other things: In the absence
11 of an express transfer of the copyright, or any rights under
12 it, the owner of the copyright in the collective work --
13 i.e., journal -- the i.e. is my own insertion -- is presumed
14 to have acquired only the privilege of reproducing and
15 distributing the contribution as part of that particular
16 collective work, and, then, a revision of that collective
17 work and, then, a later collective work in the same
18 series.

19 If one read that literally; then any permission
20 to photocopy the contribution to a journal might have to
21 come from the author.

22 Now, I don't have any quarrel with this provision,
23 itself. I would not think there would be any intention to
24 try to affect the important rights of the author with
25 respect to republishing the work, or film, or dramatic

1 acts--or that sort of thing. But, if there is to be a
2 voluntary clearinghouse, and if participation in that requires
3 the individual assembly of all of the many thousands of
4 authors: of contributions, I think that the work of setting
5 up their voluntary clearinghouse might be very considerably
6 impeded.

7 One possibility might be an amendment of
8 Section 201, which did not provide that, among the rights of
9 the author of the collective work -- that is, the publisher
10 of the journal -- acquired in the absence of an express
11 agreement, there was included not only use of it in the
12 journal, itself, but, also, the reproduction of it by a
13 reprographic method from the actual physical text as it
14 appeared in the journal, as a separate matter involved;
15 or, alternatively, it might, as a practical matter, just
16 become a trade practice that agreements with authors included
17 that particular right.

18 This might become a stumbling block that would be
19 adverse to the interest of authors who might, in fact, like
20 to have a collective clearinghouse if it collectively awarded
21 them with something, but who would not necessarily want to be
22 involved in having to have this burden of clearinghouse with
23 all the commissions from authors--not merely publishers them-
24 selves. Have you addressed yourself to that problem;
25 have you thought about it, and a solution for it?

1 MR. KARP: I don't think it is a problem that,
2 really, needs a solution.

3 First of all, 201(c) does say, " * * * in absence
4 of express agreement."

5 I daresay that scientific and technical publishers
6 will almost uniformly require their authors to sign an
agreement; so you eliminate that whole area.

8 When it comes to the author of a short story, or
9 a poem which has appeared in Harpers, or Partisan Review,
10 it will only be a matter of a short time before you can
11 induce most authors -- out of sheer self-interest -- to
12 participate voluntarily in a clearinghouse arrangement,
13 just as all playwrights -- purely voluntarily; no coercion
14 -- participate in one of those voluntary clearinghouses I
15 mentioned, which license dramatic works because there is no
16 possibility of collecting money otherwise.

17 MR. LACY: I don't think they are on all fours,
18 though, because, Irwin, if you want to know about the
19 rights in producing a particular play, in the first place,
20 you are performing in a high school dramatic thing. You
21 are still thinking of a fair piece of change -- \$25.00;
22 \$50.00; \$100.00; \$1,000.00 -- depending on the play, which
23 is worth a certain amount of paperwork; and the transaction
24 is separate.

25 In the second place, you are always interested in

1 that particular play. The licensee under the clearinghouse
2 -- the library that has made a deal with the clearinghouse --
3 wants to know whether it can reproduce articles from
4 Scientific American. It would be an intolerable situation,
5 almost, it seems to me, if you had to say, "Under Scientific
6 American, here is a list of 535 authors, or 9,216 authors,
7 whose contributions you can reproduce, but here are 49 who
8 are dead and whose widows -- " you can see the problem.
9 I agree with you, it would be in the interest of authors
10 to have this happen, and I think it is a minor right. I am
11 not trying to back into something that would deal with the
12 substantive right 201(c) is meant to protect.

13 I think it just deserves some attention; and I
14 really would be pessimistic about the voluntary participation
15 of individual authors so that a licensee of the clearinghouse
16 had to satisfy himself not only as to the inclusion of the
17 journal on the list of cleared things -- that, of itself,
18 would be a considerable job, with tens of thousands of
19 journals possibly involved. To go beyond that, to each
20 individual contribution, I think would become very
21 difficult.

22 MR. NIMMER: A related question is:

23 In your view, is 201(c) retroactive in its
24 effect?

25 MR. KARP: I have asked myself that question, and

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1 I have not been able to answer it. I think there is a
2 question as to whether it is, or is not.

3 MR. NIMMER: I agree.

4 MR. KARP: The Bill is full of provisions that
5 may or may not be retroactive.

6 MR. LACY: In effect, 201(c) is not that different
7 from case law.

8 MR. NIMMER: Except for the word, "express".
9 "Among other things, this requires an express transfer."

10 MR. KARP: The Dr. Seuss case did not hold what
11 201(c) said. It held just the contrary, But these were
12 before Goodis, and I think it was really Goodis that laid
13 the foundation that this should have been the law--and
14 might have been, if there had been further litigation.

15 I can only respond, again, by saying that I am
16 more optimistic than you are. I don't think either of us
17 can judge at this point, really.

18 MR. LACY: I certainly cannot. I just raised
19 the question.

20 MR. KARP: All I know is that no one forced
21 20,000 composers into ASCAP, But they are all there.

22 MR. LACY: But, again, you are talking about
23 an individual composer. You look it up and, yes, you
24 can use Irving Berlin's work. That is what you look it up
25 under, anyway.

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1 MR. KARP: In the real world, they just use it.

2 Sometimes they find that there are exceptions
3 there. That there actually are composers or publishers
4 who don't belong to ASCAP, BMI, or SESAC -- but they
5 don't shut down the radio station.

6 MR. NIMMER: Another way to focus on this problem:
7 Suppose there were a movement either by CONTU or Congress
8 -- or whatever -- to amend that part of 201(c) to make explicit
9 that the rights that the journal acquires are in addition
10 to the rights as spelled out there -- a right to give
11 a grant for Xerographic reproduction, or whatever.

12 Would the Authors League oppose that?

13 MR. KARP Very, very strongly! And we would
14 point out that you have no guarantee that the journals for
15 which you are expropriating those rights themselves
16 would enter a voluntary clearinghouse.

17 MR. NIMMER: That might be met otherwise. But,
18 if you are saying that an author might well be expected
19 to agree to this in private, consensual agreement, why
20 is that so different, as far as the Authors League is
21 concerned--if that same result is achieved by law?

22 MR. KARP: Because you are depriving him of one
23 of his basic rights. Because you are, also, depriving
24 him of the choice -- if there is to be a choice -- of
25 clearinghouses.

1 MR. NIMMER: Even though, in your view, he likely
2 would consent; but you don't want to take that right away
3 from him?

4 MR. KARP: Sure! Because we have already eroded--
5 in the new Copyright Law, to a large extent,--the freedom
6 of choice, and each time you call out another exception, you
7 threaten the whole structure.

8 MR. NIMMER: You do suggest a very narrow
9 area of choice. He probably would voluntarily give it,
10 anyway.

11 MR. KARP: Yes. It was suggested in the
12 argument of Williams and Wilkins that one way out of
13 that dilemma was to consider whether--in a medium where
14 use was to continue--was bound to occur-- on a wide
15 and enormous scale, with repeated minor transactions--
16 whether the failure of the copyright owner to enter into a
17 reasonable clearinghouse arrangement might, itself,
18 constitute a "fair use" defense.

19 There are other ways to skin the cat than
20 taking away rights.

21 MR. LACY: You would feel that, under the present
22 situation, only a journal that included all of its
23 agreements with all of its authors and refused to
24 publish a contribution in the absence of such an agreement,
25 only those journals that had uniform agreement, that (only) they

1 had the right to license the sort of thing we are talking
2 about licensing through a clearinghouse. Only such a journal
3 could enter into the clearinghouse, totally?
4

5 MR. KARP: It could enter it for whatever rights
6 that it acquired.

7 MR. LACY: But you could never say, "Anything in
8 Harpers can be Xeroxed on this basis."

9 MR. KARP: You are naming one of several magazines
10 that I think would probably say, "Even if you passed a
11 provision such as has been suggested, we, as a publisher, will
12 not take those rights away from the author. We would only
13 enter his work in the clearinghouse if the author agrees."

14 MR. LACY: I am not suggesting that they
15 "take it away", any more than they take away paperbound
16 rights or book rights.

17 MR. KARP: I will repeat it.

18 I think there are some publishers who respect
19 the authors' rights--especially journal publishers and,
20 to an extent, literary magazines, for example.

21 I am not talking about big business magazines,
22 or national circulation magazines.

23 MR. KARP: There are literary magazines that I am
24 convinced we would never enter an author's work in a
25 clearinghouse even if Congress amended this section to
give them the right to do so.

1 MR. LACY: And, equally, would have no right
2 to move against an infringer who copied that.

3 MR. KARP: Sure they could. Why not?

4 MR. LACY: What right do they have to do that?

5 MR. KARP: They own the right.

6 MR. LACY: They would not own the right to reproduce
7 it. All they own is the right to publish it.

8 MR. KARP: You are amending the law. You are
9 proposing an amendment of the law which would
10 give the journal publisher that particular right.
11 Of course it could sue for an infringement!

12 MR. LACY: What right of his is infringed?

13 MR. KARP: The one you are proposing to give
14 in amending 201(c).

15 MR. LACY: If it is amended, sure; but, as it
16 stands?

17 MR. KARP: I am talking about what would happen
18 if the amendment you propose were adopted.

19 MR. LACY: Then you would have the right.

20 MR. KARP: You would have the right to sue.
21 I am saying that some of them would not even enter the
22 works in the clearinghouse.

23 MR. LACY: That is quite possible.

24 JUDGE FULD: Any other questions?

25 MR. FRASE: You raised several questions about

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1 guidelines. You raised a question as to whether the
2 Commission wants to get into these areas.

3 Do you have a positive recommendation that the
4 Commission do so; and, if the answer to that is "Yes",
5 would you propose that the Commission take the initiative -
6 or that the private parties get together first, and come to
7 the Commission with something that they can agree to?

8 MR. KARP: No. I am not making firm recommenda-
9 tions as to whether the Commission should take the
10 initiative.

11 The Authors League did not recommend that the
12 Commission take the initiative on 108(g)(2); nor did
13 the Association of American Publishers.

14 What I am suggesting is that the Commission
15 indicate to the interested parties -- the Authors League;
16 the Association of American Publishers, and the Library
17 Association -- whether it plans to put on that hat
18 again -- the hat it wore in helping to formulate the
19 Interlibrary Arrangements Proviso -- in connection with
20 other areas of 108, where the Senate Judiciary Committee
21 suggested that guidelines be drawn.

22 If the Commission, itself, decides that it is
23 not going to do it, and tells us so, then we can guide
24 ourselves accordingly.

25 JUDGE FULD: Ms. Wilcox?

1 MS. WILCOX: I think you suggested that we should
2 pay some attention to coin-operated machines.

3 Are you suggesting that self-operated machines
4 are not the concern of the Authors League?

5 MR. KARP: Of course they are our concern! But
6 the reason I made this suggestion is that Congress, in passing
7 the law which established this Commission, instructed it to
8 compile data and study certain questions. One of the
9 questions is: the machine reproduction of copyrighted
10 works. That was one of the specific purposes of creating
11 this Commission, and to make recommendations for the
12 recognition of Authors in connection with that reproduction
13 and, since coin operated machines are one of the most
14 extensive instruments of machine reproduction of copyrighted
15 works, it seems to me that that is a task well within the
16 Commission's mandate.

17 MS. WILCOX: Do they know that?

18 MR. KARP: Well, I know it only because librarians
19 have told me, in many meetings, that we should not be worried
20 about their copying; that far more is done by coin-operated
21 machines.

22 MS. WILCOX: I think it was "other machines".

23 MR. KARP: No, "coin operated" is the word I
24 heard. I am not suggesting that the Commission come up with
25 that answer.. If it compiles and studies the data, it may have

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1 very well come up with the answer that you are implying: that
2 there is very little copying of copyrighted material.

3 MS. WILCOX: No. I did not say that.

4 MR. KARP: Well, not as much as I think you "think"
5 there is!

6
7 MS. WILCOX: No. I was suggesting that there is
8 a whole area of the self-operating machines.

9 MR. LACY: Not coin operated.

10 (i.e.) Like in your office; or my office.

11 MR. KARP: I would treat that in the same way I
12 would if a library maintains self-operated machines --
13 if an institution uses self-operated machines for its
14 staff. If you take one aspect of it, that is institutional
15 operating.

16 MS. WILCOX: But not institutional -- say --
17 "business".

18 MR. KARP: I meant that in a broader sense.

19 MS. WILCOX: Okay.

20 MR. NIMMER: May there not be a big difference in
21 policing and enforcing rules, on the one hand, in the
22 public library and, on the other hand, the private industry?

23 They are both institutional.

24 MR. KARP: There might be a difference between
25 a branch library with a coin operated machine, which is used

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1 mostly to prepare copies of tax returns, and a large
2 research library where the machine is merely a
3 printing press. Colleges.

4 MR. NIMMER: It is true, there are differences,
5 in what is put into the machine--according to the
6 environment in which it is located.

7 I was speaking more of the differences in being
8 able to rely on the operator to conform in good faith with
9 guidelines, or whatever else the law may be, suggesting
10 that maybe there is a big difference in that ability to rely--
11 as between, on the one hand, the non-profit institutional
12 library and, on the other hand, a private industrial use
13 of the machine.

14 MR. KARP: That is very possible, yes.

15 MR. WEDGEWORTH: I have a question, Mr. Karp.

16 You expressed an opinion that you would favor
17 the development of clearinghouses under private auspices--
18 as distinguished from those under Government auspices.

19 I was wondering if you would be willing to
20 express an opinion for a further division of that. And
21 that division I have in mind is that we know from the
22 testimony and the discussions that have been held over the
23 past several years, that you have a fairly large network
24 of operating libraries, information analysis centers, and
25 other information-type organizations that are doing the type

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1 of work that we are discussing controlling at this point.

2 Do you have any comments on these organizations
3 assuming the responsibility for these clearinghouse functions?

4 MR. KARP: The user organization?

5 MR. WEDGEWORTH: No. The libraries in various
6 settings.

7 MR. KARP: That is what I meant by "user"; whether
8 the libraries should assume any responsibility.

9 MR. WEDGEWORTH: Yes.

10 MR. KARP: Well, clearinghouses can work at either
11 end.

12 A clearinghouse can be an organization of those
13 who want licenses and organize to get them. Television
14 Network, to some extent, is such a clearinghouse; or it
15 can be an instrument of those who want to grant licenses;
16 or it could be a joint instrument serving both ends of the
17 channel.

18 MR. WEDGEWORTH: Your primary objective is to
19 be able to have an effective way to disseminate the work
20 of the author at fair compensation?

21 MR. KARP: Yes. I agree with that.

22 MR. WEDGEWORTH: Then, would you be willing to
23 expand upon why you drew the first distinction between a
24 government-operated clearinghouse, and other types of
25 clearinghouses?

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1 MR. KARP: It is a fundamental, Constitutional
2 belief that Government should stay as far away from
3 the dissemination of information as it can--and from
4 controlling any instrument that is involved in the dissemina-
5 tion of information.

6 MR. WEDGEWORTH: Would you include the Library of
7 Congress in that category?

8 MR. KARP: As a library, or as a clearinghouse?

9 MR. WEDGEWORTH: Well, in terms of carrying out
10 clearinghouse type functions.

11 MR. KARP: I would prefer to see it done by a
12 private organization. I would prefer to see it done by
13 private organizations but, at the very least, if the
14 Government were to get into it, I would certainly not like
15 to see the Government have an exclusive position --
16 at the very least. Just as I don't think a Government
17 should establish a press agency; and we don't. And that is
18 why the United States Information Agency is absolutely
19 prohibited from operating within the confines of the United
20 States.

21 MR. WEDGEWORTH: The reason that I wanted to
22 that
23 explore the question is/one of the underlying issues to the
24 establishment of clearinghouses, in my opinion, would be
25 the extent of the commitment to cover a broad range of
types of materials--represented by the diversity of your

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1 membership, for example. I think this is a problem,
2 since the economic viability of providing certain high profile
3 materials is not the same as having to stock and keep
4 constantly available a tremendous diversity of materials
5 to supply through a clearinghouse function. I was
6 interested in the distinctions that you drew between the
7 two--if it was more than just a philosophical objection--
8 but you did modify it by saying that, "if that could not
9 occur under other circumstances" * * * .

10 MR. KARP: Well, I would not want my candor
11 to be taken as an agreement that there ought to be a
12 Government clearinghouse. If one were foisted on us,
13 it would be more acceptable if it were competed with by
14 private industry. I don't see the need for the Government
15 to get into this business.

16 MR. NIMMER: Well, I can understand, better, why
17 publishers object than I can why authors object-- as I
18 understand your point -- your First Amendment point.

19 Is that the only point, or is there also an
20 economic consideration?

21 MR. KARP: There are other considerations.

22 The Government is not always the most generous
23 patron of the literary arts, and there is no great record
24 of such beneficence that authors can say, "Oh, if the
25 Government does it, we are going to be well treated."

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1 If you look at the Budget of the National Endowment,
2 you will see how little of it goes to professional authors.
3 A lot of it goes to the National Endowment for Humanities.
4 It is a lot easier to get a grant to study snakes, than it
5 is to get a grant to write a book. It is easier to "study"
6 than it is to write a book.

7 MR. NIMMER: But there are, are there not, two
8 separable issues?

9 (1) Who is going to be organizing and running
10 the structure -- private or public?

11 (2) The other is: Who is going to be
12 determining the price? The market, or, by fiat, the
13 Government, or otherwise?

14 Those are, really, separate questions.

15 One could conceive of a compulsory licensing
16 system within the confines of a privately-run clearinghouse.
17 One could, likewise, conceive of a publicly-owned clearinghouse
18 with the prices determined by the marketplace.

19 So I just think it is hard to separate that out.

20 MR. KARP: But I don't think that the problem
21 of precedent and principle should be lightly brushed
22 aside here, because we are all talking about communication;
23 and we are all talking about the dissemination of informa-
24 tion, and we have had inroads into this essentially private
25 area. If we are to continue the protection of the Freedom

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1 of the Press, one of the greatest dangers to the Freedom
2 of the Press is the Government's incursion into the
3 business of running a press; into the whole business
4 of publishing and disseminating and distributing, and so
5 on.

6 It is true that the Government Printing Office
7 has been at it a long time but, fortunately, its
8 competitiveness is such that it cannot really cause that
9 much trouble for private enterprise.

10 But, in the new area, where you are dealing
11 with a different technology, it might! I think there
12 are dangers that cannot be lightly dismissed. I think
13 many of us, on all sides of the table, are greatly
14 concerned.

15 I think that the American Library Association,
16 and we, will file many complaints in pornography cases.
17 Certainly, the American Library Association does not stand
18 any great practical risk in the field of pornography. Practi-
19 cally none at all!
20 This is an effort that could threaten freedom of
21 expression in the whole Library community, much more, if
22 the process is expanded. The first step is not
23 dangerous; the second step in and of itself is not
24 dangerous; but the First Amendment was not written on
25 a piecemeal basis. There is no law, and I think it is
an area where that "no law" principle is very important,

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1 because you can nibble away at this until you have a
2 European-style, government-controlled television/press
3 system.

4 JUDGE FULD: Any other questions?

5 MR. LEVINE: Just one comment.

6 Your testimony today, as we expected, Mr. Karp,
7 and as we requested, was on photocopying. But the
8 Commission is, also, very much interested in whatever the
9 Authors League position might be on some of the other
10 subject areas under our study-- such as: computer uses
11 of copyrighted material. If you would be willing, we
12 would be most interested in receiving whatever your views
13 are on that.

14 MR. KARP: Thank you.

15 MR. LACY: Would it be worthwhile, in defining
16 these, for Mr. Levine to give the specific subject
17 areas with respect to the feelings of the Authors League?

18 MR. LEVINE: We can do it now, or I can do it
19 by letter.

20 JUDGE FULD: Thank you very much.

21 MR. KARP: Thank you, ~~Judge~~ Fuld, and Members
22 of the Commission.

23 JUDGE FULD: The Commission will adjourn for
24 the day.

25 (Whereupon, at 3:30 o'clock, p.m., the meeting
was concluded.)